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# In the Supreme Court of the United States

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**October Term, 1972**

**No.** .....

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VIRGINIA MANNING, *et al.*,
*Petitioners,*

vs.

GENERAL MOTORS CORPORATION,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI**
**To the United States Court of Appeals**
**For the Sixth Circuit**

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Petitioners, Virginia Manning, *et al.*, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on September 11, 1972.

## REPORTS OF OPINIONS

The opinion of the Court of Appeals has not yet appeared in Federal Reporter 2d. It has been reported at 5 EPD para. 7964 (CCH). The decision of the trial court, The United States District Court for the Northern District of Ohio, Western Division, was not printed in the federal supplements but was reported at 3 EPD para. 8325. The appellate decision is annexed hereto as Appendix A. The District Court decision is annexed hereto as Appendix B. The order of the Court is annexed as Appendix C.

## JURISDICTION OF THE COURT

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit are dated September 11, 1972, and were entered on that date. Rehearing was not sought by any of the parties. None of the parties requested any extension of time for filing a petition for writ of certiorari, and the present petition is filed within ninety (90) days of the entry of the opinion and judgment of the Sixth Circuit Court of Appeals. The jurisdiction of this Court to review the judgment below is invoked under 28 U. S. C. Section 1254(1), and the appeal is timely pursuant to 28 U. S. C. Section 2101(c).

## QUESTION PRESENTED FOR REVIEW

This petition is limited to the question of whether back wages and lost employee remuneration should be awarded to plaintiffs *who were intentionally discriminated against* in a Title VII Civil Rights of 1964 suit (42 U. S. C. Sections 2000e, *et seq.*).

## STATUTE INVOLVED

Petitioners seek relief by way of an award for damages under Section 706 of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5(g), which on the date these actions were filed read as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title."

## STATEMENT OF THE CASE

The petitioners are a class of female employees at the Sandusky, Ohio, plant of General Motors Corporation. The petitioners originally filed Title VII charges in 1967 alleging that General Motors discriminated against them based upon their sex. Suit was timely filed by petitioners on October 31, 1969; and General Motors answered that any discrimination was required by Ohio Revised Code Section 4107.43, which prohibited "frequent or repeated lifting of weights over twenty-five pounds", and Section 4107.46, which prohibited the employment of females for more than forty-eight (48) hours per week, nine (9) hours per day, or six (6) days per week. The District Court held that the Ohio statutes were preempted by Title VII. Appendix B, page 9. The Court specifically held that the respondent did intentionally engage in an unlawful employment practice and did, in fact, discriminate against petitioners based upon their sex. The District Court, however, limited its relief to declaring the Ohio statutes invalid and awarding reasonable attorneys' fees but declining any award for lost remuneration because of the good faith reliance of the respondent upon the Ohio statutes.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit from that part of the judgment which denied an award of monetary damages. The Court of Appeals affirmed the District Court for two reasons: (1) When the respondent, on May 1, 1970, voluntarily ceased to comply with Ohio statutes, it had not yet had the benefit of any judicial determination preempting the Ohio statutes and (2) the Equal Employment Opportunity Commission did not definitively resolve the conflict between Ohio statutes and Title VII until August 19, 1969. The

Court of Appeals held that based upon those two factors and "all the circumstances of this case" they could not find an abuse of discretion in the District Court's refusal to award back pay.

## REASONS FOR GRANTING A WRIT

**1. The Decision of the Court Below Is in Direct Conflict with the Decision of the United States Court of Appeals for the Ninth Circuit in the Case of Schaeffer v. San Diego Yellow Cabs, Inc. (June 20, 1972), ..... F.2d ....., 4 EPD para. 7882 (CCH), Appendix D.**

The Court of Appeals in *Schaeffer v. San Diego Yellow Cabs, Inc., supra*, Appendix D, awarded back wages in a fact situation which is not as strong as the fact situation in the present case. *Schaeffer* was confronted with a California statute which restricted the hourly employment of females. In comparison, the present case involves restrictions of female employment concerning hours, job classifications, and weight lifting. In *Schaeffer*, as in the present case, the employer defended on the basis that the state statute required the discrimination and that, therefore, it was in good faith. *Schaeffer* first filed charges in 1967, which were rejected by the Equal Employment Opportunity Commission in that same year. *Schaeffer* refiled charges in January of 1968. In November of 1968, one of the Federal District Courts in California issued its opinion holding the California statute to be preempted by Title VII. *Rosenfeld v. Southern Pacific Co.* (D.C. Cal., 1968), 293 F. Supp. 1219, 1 EPD para. 9929. The District Court in the *Schaeffer* case had denied back pay. On appeal, the Ninth Circuit reversed and remanded, holding that *Schaeffer* was ". . . entitled to receive back pay for the extra hour

per day from the date when the Company had knowledge of both the *Rosenfeld* case *and* the Commission's decision in favor of Schaeffer (i.e., on some undetermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women)." Appendix D.

The Ninth Circuit in *Schaeffer* held that ". . . the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer." Appendix D. In the present case, neither the District Court nor the Sixth Circuit Court of Appeals examined the merits of the petitioners' claims nor the public policy behind them nor did the lower courts balance the petitioners' claims against whatever hardship or lack thereof an award of back wages would have had upon the respondent, General Motors Corporation.

The Court in *Schaeffer* specifically found that it would be ". . . unfair to force an innocent employee to forego his rights under law while litigation drags through the courts. . . ." Appendix D. The courts in the present case have held just the opposite. They have found that innocent employees should forego their rights while litigation drags through the courts. In the present case, the petitioners have done everything within their power since the filing of charges in 1967. The respondent, General Motors Corporation, voluntarily continued to adhere to Ohio statutes, to the detriment of the petitioners, until May 1, 1970, when it voluntarily ceased complying with Ohio statutes. This voluntary change of policy was done without necessity of any decision by any court having jurisdiction over the Ohio statutes, and it was accomplished six (6) months after petitioners filed their present action. In addition, General Motors Corporation has extensive

plants, does extensive business in California, and must have been aware of the *Rosenfeld, supra,* decision in 1968 preempting less restrictive state statutes. The respondent having voluntarily elected to abide by statutes which it knew to be in jeopardy should have borne whatever loss was suffered, especially in comparison to the position of the successful petitioners.

If the *Schaeffer* case were applied to the present fact situation, an award of back wages would be ordered paid by the respondent to the petitioners. It is submitted that the District Court erred in not awarding back pay to the petitioners.

**2. The Award of Back Wages for Intentional Sex Discrimination Is an Important Question of Federal Law Which Has Not Yet Been, but Should Be, Settled by This Honorable Court.**

This Court in *Griggs v. Duke Power Co.* (U.S. S. Ct., 1971), 91 S. Ct. 849, 401 U.S. 424, 28 L. ed. 2d 158, held that ". . . Congress directed the thrust of the Act [Title VII] to the *consequences* of employment practices, not simply the motivation." Yet despite this prior pronouncement, this Court has never passed upon the obligation to award back wages to successful litigants who were the victims of intentional sex discrimination, even though the respondent alleges that certain state statutes required such discrimination.

There can be no question but that private litigants in the position of petitioners act as private attorney generals to vindicate Congressional policy which is determined to be of highest priority. *Bowe v. Colgate-Palmolive Co.* (C.A. 7, 1969), 416 F.2d 711, 61 LC para. 9326, reversing 272 F. Supp. 332, 56 LC para. 9069 (D.C. Ind., 1967). The

*Bowe* case, *supra*, further found that the right to award back wages should be broadly read so as to ". . . effectively terminate the practice and make its victim whole."

In the present fact situation, the male counterparts at respondent's plants have benefits in comparison to the petitioners. They received the better-paying jobs and the overtime, time-and-a-half, and double-time benefits. The economic loss is, therefore, to be suffered by either the females or General Motors Corporation. It is unfair and inequitable to say that the successful litigants, having established intentional acts of discrimination and having done all that they could do since 1967, should suffer the economic loss in comparison to General Motors Corporation, which voluntarily elected to follow and eventually voluntarily elected to cease abiding by state statutes, while at all times knowing full well of the course of litigation and of the decisions such as *Rosenfeld, supra*. If the decision of the Sixth Circuit below is permitted to stand, it will have a distinct chilling effect tending to prevent persons discriminated against from undertaking the tedious and demanding pursuit of their rights. If employers can pick and choose between statutes and voluntarily adhere to and then denounce their prior elections with complete impunity, there exists no incentive for individuals to attempt to enforce the Congressional policy.

Title VII, 42 U. S. C. Section 2000e-12(b), does provide for an exception to employer liability. Pursuant to that section, General Motors could have requested and received a written interpretation or opinion from the Equal Employment Opportunity Commission and, by statute, could have been exonerated from any liability. General Motors was aware of the conflict, Appendix A, yet did not seek to ultilize the statutory exception. Having not utilized the statutory exception, the respondent should not be per-

mitted to escape liability and to shift the economic loss to the petitioners.

## CONCLUSION

In the present case, an award of back pay to the petitioners should be made. The lower court decisions are in error in denying an award of back pay in this case. The decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals in *Schaeffer, supra,* and with the Seventh Circuit Court of Appeals in *Bowe, supra.*

The issue of the appropriateness of an award of back wages under Title VII is of utmost importance in determining the future course of litigation and the consequences of such future litigation. A decision by this Honorable Court is necessary in order to give guidance to the lower courts and to bring uniformity between the litigants.

A writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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## APPENDIX A

**Opinion and Order of the Court of Appeals**

(Decided and Filed September 11, 1972)

Nos. 71-2068, 71-2069 & 71-2070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIRGINIA MANNING, ETC.,
*Plaintiff-Appellee,*

v.

INTERNATIONAL UNION, ETC., ET AL.,
*Defendants-Appellants,*

VIRGINIA MANNING, ETC.,
*Plaintiff-Appellant,*

v.

GENERAL MOTORS CORPORATION, ET AL.,
*Defendants-Appellees.*

VIRGINIA MANNING, ETC.,
*Plaintiff-Cross-Appellee,*

v.

GENERAL MOTORS CORPORATION, ET AL.,
*Defendants-Cross-Appellants.*

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APPEAL from the United States District Court
for the Northern District of Ohio.

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Before: PHILLIPS, Chief Judge, KENT, Circuit Judge, and MCALLISTER, Senior Circuit Judge.

KENT, Circuit Judge. These appeals and cross-appeals are from a class action challenging General Motors Corporation's compliance with the Ohio "female protective statutes," particularly Sections 4107.42, 4107.43 and 4107.46, Ohio Revised Code. Section 4107.42 deals with *"Working conditions for females,"* Section 4107.43 deals with *"Occupations in which employment of females prohibited,"* and Section 4107.46 deals with *"Total hours and days of employment."*

In her complaint, the plaintiff, on behalf of herself and the members of her class, alleged that by complying with the Ohio Statutes General Motors was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e et seq., particularly Title 42 U.S.C.A., § 2000e-2(a)(1), which forbids discrimination in employment against any individual on the basis of sex.

The original action was commenced against General Motors, but, on motion by General Motors, the appropriate Ohio authorities, the International Union United Automobile Aerospace and Agricultural Implement Workers of America (International), and Local 913 U.A.W. (Local) were added as parties-defendant. Subsequently, the District Court realigned the parties and made the International and the Local parties-plaintiff.[1]

After appropriate proceedings under the provisions of Rule 23, Rules of Civil Procedure, 28 U.S.C.A., the trial judge determined that there was a proper class action, and that the plaintiff, Virginia Manning, was an appropriate representative of the class. We find no merit to the challenge to these conclusions. Class actions are an appropriate

1. For some undisclosed reason the International and the Local continued to be named as defendants despite the order of the trial court.

vehicle for challenges to discriminatory employment practices, *Blue Bell Boots, Inc. v. E.E.O.C.*, 418 F.2d 355 (6th Cir. 1969).

After motions for summary judgment by all parties, the trial court concluded that the Ohio female protective laws in question were invalid as being in conflict with Title VII of the Civil Rights Act of 1964, and, therefore, ineffective. From this decision the State of Ohio appealed. Subsequently, the Supreme Court of Ohio, in *Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 281 N.W. 2d 1 (1972), reached the same conclusion, and the State of Ohio was permitted to withdraw its appeal and this issue is not now before this Court.

The trial court, by its final order, denied an injunction because General Motors had ceased to comply with the Ohio female protective laws as of May 1, 1970; it denied back pay to the female employees of General Motors. In its order the trial court determined that the plaintiffs were entitled to reasonable attorney fees but made no determination of amount.[2] The trial court retained jurisdiction "to insure that General Motors does not alter its policy and commence complying with said Ohio female protective legislation." (App. pg. 151).

On this appeal we are required only to consider whether the order of the District Court afforded to the plaintiffs the relief to which they were entitled, and whether such relief was "appropriate" within the meaning of Title 42, U.S.C.A. § 2000e-5.

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2. "FURTHER ORDERED that the plaintiffs are entitled to an award of reasonable attorney fees against the defendant General Motors Corporation to be agreed upon between the parties and, if they are unable to so agree, to advise the Court and that this matter will then be set for a hearing to determine same." (App. pgs. 151, 152).

General Motors conceded in the trial court that it had complied with the Ohio female protective laws and that as a result thereof it had denied certain jobs to females and had denied overtime opportunities to females. It defended on the ground that it had acted in good faith because of the uncertainty as to the validity of the Ohio female protective legislation.

A summary of the facts is appropriate. The authorities of the State of Ohio enforced the Ohio statutes relating to the employment and circumstances of employment of females until September 4, 1969, when the Director of the Ohio Department of Industrial Relations, by a letter addressed to the Chief, Division of Women and Minors and Minimum Wage, advised: "* * * effective September 4, 1969, this department will not prosecute any alleged violations of the Ohio female labor laws that are in conflict with the new federal rules as published by Equal Employment Opportunity Commission." (Exh. E, App. pg. 81). This letter was written because of a change in the guidelines by the Equal Employment Opportunity Commission issued August 19, 1969. On October 22, 1969, the general counsel for the International and the assistant general counsel for General Motors joined in a letter to the Director of the Department of Industrial Relations, requesting that a ruling be obtained from the Attorney General of Ohio as to the validity of the Ohio female labor laws in light of Title VII of the Civil Rights Act of 1964 and the sex discrimination guidelines issued by the Equal Employment Opportunity Commission on August 19, 1969. The Director of the Department of Industrial Relations refused to request such an opinion, and in his letter to the International and General Motors stated:

> "Notwithstanding the action taken by this department, any county prosecutor, law director, or city solic-

itor could prosecute if he so chooses. Accordingly, an employer is not immune from all liability from our action." (Exh. G, App. pg. 86).

This lawsuit was filed on October 31, 1969, and the Ohio authorities, including the Director of the Department of Industrial Relations, were made parties-defendant on March 13, 1970. Despite the pendency of the lawsuit, the Director of the Department of Industrial Relations issued a public statement on September 14, 1970, stating *inter alia*:

> "Accordingly, effective immediately, the Ohio Department of Industrial Relations will prosecute employers that employ women in violation of the Ohio Female Labor Laws." (Exh. H, App. pg. 87).

Prior to the commencement of this lawsuit this plaintiff and other females had filed charges of unlawful discrimination with the Equal Employment Opportunity Commission. No women who filed a complaint against General Motors, based upon Ohio employment, obtained a favorable ruling before the Equal Employment Opportunity Commission until March 28, 1969, when the Equal Employment Opportunity Commission entered a decision in favor of this plaintiff and a number of others, holding that General Motors was acting in violation of Title VII of the Civil Rights Act of 1964 in complying with the Ohio female protective laws.

The Equal Employment Opportunity Commission did not take a firm position with regard to the conflict between State female protective laws and Title VII of the Civil Rights Act of 1964 until it handed down its revised guidelines relating to sexual discrimination in employment on August 19, 1969.[3] Obviously, the defendant, General Motors,

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3. For a discussion of the problems of an employer attempting to comply with state laws which restrict employment of women

(*Continued on following page*)

was on the horns of a dilemma. No definitive judicial interpretation of the conflicts between the female protective laws of the states and Title VII of the Civil Rights Act had been handed down. No court had declared that the Ohio statutes were ineffective because the field had been preempted by the federal legislation, thus making applicable the provisions of the Supremacy Clause of the United States Constitution, Article VI, Section 2, and the Equal Employment Opportunity Commission did not take a firm position on the issue until two months before this lawsuit was commenced. Until that time the Commission had not taken any official position as to the enforceability of laws such as those with which we are here concerned, the Ohio authorities, except as herein set forth, had at all times insisted that the Ohio statutes were applicable to employment of females in industrial plants in Ohio.

On May 1, 1970, while this action was pending, defendant, General Motors, ceased to comply with the Ohio female protective laws and continued to refuse to comply with such laws despite the fact that the Court of Appeals for Franklin County, Ohio, found the laws valid on March 9, 1971. *Jones Metal Products Co. v. Walker*, 25 Ohio App. 2d 141, 267 N.E.2d 814, Reversed 29 Ohio St.2d 173, 281 N.E.2d 1 (1972). We find no fault with the District Court's refusal of an injunction which could have done no more than restrain the defendant, General Motors, from doing that which it had not been doing for more than a year before the date the District Court order was entered. Ade-

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Footnote continued—
and at the same time comply with the Civil Rights Act of 1964, including a discussion of the vacillation of the Equal Employment Opportunity Commission, see the carefully prepared opinion by United States District Judge Gerald J. Weber in *Kober v. Westinghouse Electric Corp.*, 325 F.Supp. 467 (W.D.Pa. 1971). See also *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971), for a discussion of the conflict between the Civil Rights Act of 1964 and state laws.

quate protection was afforded to the plaintiffs by the trial court's retention of jurisdiction in order to insure that General Motors would not change its policy. The Court may wish to reconsider this issue after remand in the light of the decision of the Ohio Supreme Court in *Jones Metal Products Co. v. Walker, supra.*

The plaintiffs, including the unions, suggest that the Courts of Appeals which have considered Title VII of the Civil Rights Act of 1964 have granted back pay. It is suggested in plaintiffs' brief that back pay has been ordered even though there has been a claim of good faith. A close analysis of the cases cited, however, is very enlightening. *Weeks v. Southern Bell Telephone & Telegraph Company,* 408 F.2d 228 (5th Cir. 1969), was a case in which the Georgia rule relating to weights which women could lift had been repealed before the case was before the Court of Appeals and the case was remanded for determination of the appropriate relief. *Bowe v. Colgate-Palmolive Company,* 416 F.2d 711 (7th Cir. 1969), involved no statute and related to a company-imposed weight limitation for female employees. *Robinson v. Lorillard Corporation,* 444 F.2d 791 (4th Cir. 1971), involved color discrimination and no state statute was involved. A decision by the United States Supreme Court, *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (1971), granted relief, but was concerned with a company rule and not with a state statute. And the Court of Appeals for the Ninth Circuit in *Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971), affirmed one decision denying damages, but subsequently, in an opinion handed down on June 20, 1972, reversed a trial court's decision which had denied back pay. *Schaeffer v. San Diego Yellow Cabs, Inc.,* No. 71-1442, June 20, 1972. However, in *Schaeffer* the Court concluded that under the circumstances in that case the employer was not justified

in relying upon the California statutes despite the language in *Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219, 1227, where the same Court said:

> "Prior to a judicial determination such as evidenced by this opinion, an employer can hardly be faulted for following the explicit provisions of applicable state law."

*LaBlanc v. Southern Bell Telephone & Telegraph Co.*, 333 F.Supp. 602 (E.D.La. 1971), denied back pay in a case in which the plaintiff successfully challenged the Louisiana female protective statute. The District Court's decision was affirmed in a per curiam opinion of the Fifth Circuit Court of Appeals in *LaBlanc v. Southern Bell Telephone & Telegraph Co.*, No. 71-3402, May 25, 1972. A similar result was reached in *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore., 1969), a case involving a female protective order by a state commission.

The Supreme Court has stated that administrative interpretations by the enforcing agency are entitled to great deference, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), but that Court has also held that "state statutes, like federal ones, are entitled to the presumption of constitutionality until their validity is judicially declared." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). The defendant, General Motors, did not have the benefit of any judicial determination of the validity of the Ohio female protective laws until 1971, and the enforcing agency had not handed down any definitive administrative interpretation which would assist in resolving the conflict between any such state statutes and the provisions of Title VII until August 19, 1969. Under all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs.

We do not reach the issue of the propriety of the allowance of attorney fees as permitted by Section 706(k) of the Act, 42 U.S.C.A. § 2000e-5(k) because the District Judge did not enter any final appealable order on this issue.

For the reasons herein stated and for the reasons set forth in the memorandum opinion of District Judge Don J. Young the judgment of the District Court is affirmed.

**Order of the Court of Appeals**

(Filed September 11, 1972)

No. 71-2069*

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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VIRGINIA MANNING, etc.,
*Plaintiff-Appellant,*

v.

GENERAL MOTORS CORPORATION, *et al.*,
*Defendants-Appellees.*

---

Before: PHILLIPS, *Chief Judge*, KENT, *Circuit Judge*, and McALLISTER, *Senior Circuit Judge*

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JUDGMENT

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
*Clerk*

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**Note*: Identical judgments were entered in the related appellate Docket Nos. 71-2068 and 71-2070.

## APPENDIX B

### Opinion of the District Court

(Filed August 10, 1971)

Civil No. 69-334

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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VIRGINIA MANNING, ETC.,
*Plaintiffs,*

vs.

GENERAL MOTORS CORPORATION, *et al.*,
*Defendants.*

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### OPINION

YOUNG, *J*:

This cause came to be heard on defendants' General Motors, William O. Walker, and Gabriel Blumer, representatives of the State of Ohio, motion for summary and declaratory judgment; motion of plaintiff Virginia Manning and her class for declaratory judgment; and upon the motion of plaintiffs International Union and Local 913 for declaratory and summary judgment. The Court having considered all of the documents filed with respect to said motions, the pleadings, affidavits, and memoranda, and having heretofore made an order permitting plaintiffs to proceed as a class, and having heretofore ordered the addition of the State of Ohio as a party defendant, concludes

that the motions for summary and declaratory judgment are well taken, as there is no genuine dispute with regard to a fact which is material to the resolution of the issues before the Court.

At the outset, this Court will state some of its conclusions of law:

1. Jurisdiction has been properly invoked pursuant to 42 U.S.C. §2000e-5(f);

2. General Motors is an employer within the meaning of 42 U.S.C. §§2000e and 2000e-2;

3. The plaintiffs have complied with all procedural requirements under Title VII of the Civil Rights Act of 1964 necessary for the commencement and maintenance of this action.

4. This action constitutes an actual case or controversy between the parties hereto, as contemplated by 28 U.S.C. §2201;

5. As stated in a prior memorandum of this Court, filed on January 6, 1971, plaintiff was given permission to proceed with this suit as a class action.

The three issues presented in this case are:

1. Whether the plaintiffs' release of Local 913, pursuant to the consummation of a conciliation agreement between plaintiffs and Local 913, which was formulated by the Equal Employment Opportunities Commission, hereinafter referred to as EEOC, by operation of law resulted in the release of General Motors for all actions arising from the violation of Title VII of the Civil Rights Act of 1964;

2. Whether the Ohio "protective" laws, particularly Ohio Revised Code §§4107.42, 4107.43, and 4107.46,

are in conflict with or superseded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*;

3. Whether General Motors should be held liable for the unlawful employment practices engaged in.

## ISSUE I

The first issue before the Court is whether the plaintiffs' release of Local 913, pursuant to the consummation of a conciliation agreement between the plaintiffs and said Local, which was formulated by the Equal Employment Opportunity Commission, hereinafter referred to as EEOC, by operation of law resulted in the release of General Motors for all actions arising from the violation of Title VII of the Civil Rights Act of 1964.

This is a case of first impression, as to what is the legal effect upon a third party which is charged with having violated 42 U.S.C. §2000e-2(a) of Title VII of the Civil Rights Act, when that third party does not join in the conciliation agreement formulated by the agency, which is charged with the statutory duty of trying to bring about compromise and settlement with regard to the alleged unlawful employment practices, so as to right the wrong and obviate the necessity of the complainants turning to the courts and instituting a civil rights action for the redress of grievances.

General Motors, which was charged as the "Respondent Employer" by the plaintiffs before the EEOC, contends that the conciliation agreement between the plaintiffs and Local 913, hereinafter referred to as Local, the other respondent party charged before the EEOC with having violated 42 U.S.C. §2000e-2(a), is merely a release of the latter, since the complainants failed expressly to reserve

any rights which they had or may have had against General Motors. General Motors argues that according to the well settled law of the State of Ohio, or federal law, if this Court determines that the latter is applicable, the release which was given to Local inures to the benefit of General Motors, because they are joint tortfeasors and the plaintiffs did not expressly reserve the rights which they had or may have had against General Motors. General Motors refers to the third paragraph of the general provisions of the conciliation agreement, a copy of which is attached as Exhibit "A" to the motion of both unions for dismissal as parties defendant, which is part of the record, and contends that the language employed therein is indicative of the fact that the conciliation agreement entered into is a release. Rather than concentrate on any one provision of the conciliation agreement, the agreement should be construed as a whole. General Motors argues that the conciliation agreement is merely an example of the average common or garden variety type release. This Court rejects that contention, because it would be contrary to the policy of encouraging voluntary compliance with the law whenever possible. In light of the apparent conscious intention of General Motors not to become a party to the conciliation agreement, permitting it to ride the coattails of Local and reap the benefits of that settlement would be unconscionable. This Court will not be the first to determine that a conciliation agreement negotiated by a federal administrative agency is merely a release. To accept General Motors' contention would tend to frustrate the Congressional purpose of fostering voluntary compliance with settlement agreements devised by the administrative agency which Congress entrusted with developing expertise in implementing Title VII Civil Rights policy, so as to eliminate unlawful employment practices

by employers and labor organizations. Congress intended, where possible, to obviate the necessity of having complainants turn toward the federal judiciary for a redress of the unlawful employment practices based upon sex discrimination, see 42 U.S.C. §2000e-5 *et seq.*, if action taken by the proper agency can adjudicate the dispute, except for, of course, judicial review of administrative action. *Dent v. St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969). General Motors made its choice and now must accept the consequences of it.

Since this issue is one of first impression, this Court is faced with the alternative of construing the conciliation agreement as a release or as a partial settlement, initiated by the agency which has a statutory duty of fostering conciliation between the adverse parties whenever possible. 42 U.S.C. §2000e-5(e). If this Court were to conclude that the conciliation agreement is a release, there would be a strong probability that by operation of law General Motors would be free of all liability for various employment practices, notwithstanding the fact that the EEOC determined there was reasonable cause to believe that the employment practices in question were in contravention of Title VII of the Civil Rights Act of 1964. On the other hand, if this Court were to determine that the conciliation agreement is a partial settlement of the case which was pending before the EEOC, and is now pending before this Court, General Motors would not be relieved of liability by operation of law. Furthermore, it would not be placed at a disadvantage, except with regard to its own affirmative action in not being a party to the conciliation agreement. The latter alternative is the better view, because it does not penalize the complainant party who enters into a conciliation agreement at the initiative of the EEOC with less than all parties charged before that agency, while the

former alternative does. The partial settlement negotiated by the EEOC executes the well settled Congressional purpose of reducing the number of cases which must be filed in federal court in order to perfect the adjudication of rights and obligations between adverse parties. As far as the instant case is concerned, it is not necessary for this Court to delve into the alleged unlawful employment practices of Local, as a result of the conciliation agreement entered into between the plaintiffs and Local, which is a complete settlement of their differences. Therefore, the Congressional mandate of reducing the complexity of cases coming before the courts which fall within one of the substantative areas of the law for which an agency has been established for purposes of adjudication, has been complied with.

When complainants have a case pending before the EEOC, this Court deems it desirable to encourage them to engage in meaningful negotiations with the adverse parties via the conciliatory efforts of the EEOC. Such action fosters the Congressional mandate of resolving past unlawful employment practices on a voluntary basis, and thus obviates the necessity of engaging in protracted civil rights litigation in the federal arena. To effectuate that goal, it is necessary to assure complainants that although they may not be represented by counsel in that state of the proceedings, as they were not in the instant case, any fair settlement which they may reach with less than all adverse parties will not via an antiquated theory—release of one joint tortfeasor—carried over from the area of tort law, operate as a release of all others, regardless of whether the complainants have received full compensation for the injuries which have been sustained.

It would be imprudent for this Court to conclude that where the EEOC can only assist in arriving at a settle-

ment between half of the adverse parties, the complainants should be held to have waived their rights against the remaining adverse parties, unless they specifically reserved their rights against the other adverse parties, especially when the complainants are not represented by counsel. Such a holding would tend to frustrate the Congressional purpose of requiring the adverse parties to air their differences before the EEOC with the hope of achieving a voluntary compliance, and thus effectuate a reduction of the federal court caseload. If the agency's conciliatory efforts fall short of gaining full acceptance by all the parties, to foster the acceptance of the partial settlement by the complainants, the latter must be assured that the partial settlement will not constitute a bar to the subsequent instituting of a civil action in federal court for the redress of grievances against the recalcitrant party. Whether they may bring an action against the party who fails to join in the conciliation agreement should not turn upon whether the complainants reserve the rights they have or may have against that non-joining party. The paramount concern is freedom from discrimination. Thus, this Court deems it appropriate to insist upon the same stringent requirement which is utilized in waiver of constitutional rights—that it has been knowingly, intelligently and willingly made. *Faye v. Noia,* 372 U.S. 391, 439 (1963). At the very least, the basic contract law doctrine of "informed consent" should be required. See, e.g., *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A.2d 69 (1960); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harv. L. Rev. 1109, 1252 (1971).

This Court will not be forced into reaching the unconscionable result of holding that by operation of law, the release given to Local inures to the benefit of General Motors. General Motors should and will be held account-

able for its affirmative failure to become a party to the EEOC negotiated conciliation agreement, which was designed to settle case numbers CL-6-4-2816, CL-7-1-5U, CL-7-3-1638U, which were pending before the EEOC.

*A fortiori*, the aforementioned reasoning applies to the case at bar, because the conciliation agreement formulated by the EEOC, and finally approved by the agency on February 24, 1970, took effect and was binding on the plaintiffs subsequent to the date they instituted suit in this Court. On October 31, 1969, within thirty days of having received the letter from the EEOC notifying them of its inability to effectuate a viable conciliation agreement, the plaintiffs filed suit in this Court. As of the time the conciliation agreement was consummated, the plaintiffs did not have a legal duty to be made a party to it, since the conciliatory efforts prior to the instituting of suit in federal court were thwarted, as evidenced by the EEOC's letter of October 10, 1969. Thus, the decision of the plaintiffs to abide by the terms of the conciliation agreement formulated subsequent to having filed suit in this Court, although not legally required until accepted by plaintiffs, as has, it is undisputed, been done, is in furtherance of the Congressional policy, as evidenced by 42 U.S.C. §2000e-5(e), of achieving a voluntary compliance with Title VII, and should be encouraged as it reduces the complexity of cases required to be adjudicated in federal court. In *Dent v. St. Louis-San Francisco Railway Co., supra*, the court stated that voluntary compliance both before and after court action is preferable to court action. The holding of this case will serve as future encouragement to such compliance.

Therefore, it is the conclusion of this Court that the conciliation agreement in question was a settlement of the complainants' case against Local only, and does not auto-

matically operate as a bar to the instituted action against General Motors.

## ISSUE II

The second issue to be determined is whether the Ohio "protective" laws, particularly Ohio Revised Code §§ 4107.42, 4107.43 and 4107.46, are in conflict with or superseded by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

Section 4107.42 provides:

> Every person . . . employing females in any factory . . . shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employees are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employees. . . .

Section 4107.43 provides:

> The employment of females in the following occupations or capacities is prohibited:
>
> . . . in employments requiring frequent or repeated lifting of weights over twenty-five pounds.

Section 4107.46 provides:

> (A) No employer shall employ a female for more than forty-eight hours in any one week or eight hours in any one day, or on more than six days in a calendar week . . . except that:
>
> (1) In manufacturing establishments a female may not be employed more than forty-eight hours in any one week or nine hours in any day, or on more than six days in a calendar week.

> (E) No employer shall employ a female for a period of more than five hours of continuous labor unless such period is broken by a meal period of at least one-half hour . . . .

The plaintiffs contend that in complying with the aforementioned sections of the Ohio Revised Code, General Motors pursued employment practices which constituted discrimination within the meaning of 42 U.S.C. §2000e-2(a). As a result of those alleged unlawful employment practices, plaintiffs contend they were not assigned to certain jobs which were reserved by men only, and thus were discriminated against with respect to compensation, terms, conditions and privileges of employment solely on account of their sex. 42 U.S.C. §2000e-2(a)(1). Plaintiffs further contend that such discrimination constituted a limitation, segregation, and classification of General Motors' employees in such a way as to deprive or tend to deprive them of employment opportunities and otherwise adversely affect their status as employees, solely on account of their sex. 42 U.S.C. §2000e-2(a)(2). General Motors does not deny that it had classified plaintiffs in such a way so as to deny them employment opportunities.

It is uncontroverted that General Motors complied with the Ohio "protective" laws up until May 1, 1970, and as a result of its compliance, women were discriminated against in the general manner in which plaintiffs allege. However, General Motors asserts as an affirmative defense to the Title VII action its compliance with the Ohio law—"protective" statutes.

As a matter of law, this Court finds that the Ohio "protective" laws, which regulate the hours and conditions of employment of women, do not create a bona fide occupational qualification, within the meaning of Title VII,

42 U.S.C. §2000e-2(h), but rather discriminate against women on account of sex. Accordingly, the Ohio "protective" laws are contrary to Title VII of the Civil Rights Act of 1964, and in light of the Supremacy Clause, are void and of no effect. U.S. CONST. art. VI, §2.

Nearly all federal courts which have considered the validity of various "protective" laws have found them to be in conflict with Title VII of the Civil Rights Act. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (thirty-five pounds); *Ridinger v. General Motors Corp.*, 39 U.S.L.W. 2548 (S.D. Ohio, March 24, 1971); *Caterpillar Tractor Co. v. Grabiec*, 317 F.Supp. 1304 (S.D. Ill. 1970); *Local 246 Util. Wkrs. U. v. Southern California Edison Co.*, 320 F.Supp. 1262 (C.D. Cal. 1969) (fifty pounds); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore. 1969) (thirty pounds); *Rosenfeld v. Southern Pacific Co.*, 293 F.Supp. 1219 (C.D. Cal. 1968), *aff'd*, No. 23,983 (9th Cir. filed June 1, 1971) (3 FEP 604), where EEOC appeared as an *amicus curiae* because of the irreconcilable conflict between federal and state law. Subsequent to the filing of the *Rosenfeld* opinion, the State of California announced that it would not appeal, and thus, the California State Division of Industrial Welfare announced that it would no longer enforce the maximum hours and weight-lifting provisions of the California "protective" laws. *Contra, Jones Co. v. Walker*, 25 Ohio App.2d 141 (March 9, 1971), which opinion this Court finds unpersuasive and therefore declines to follow; *Gubrandson v. Genuine Parts Co.*, 297 F.Supp. 134 (D. Minn. 1968), which upheld the limitation of females lifting weights in excess of forty pounds. However, this Court has taken note of the fact that *Gubrandson* relied upon *Weeks v. Southern Bell Telephone Co.*, 277 F.Supp. 117 (S.D. Ga. 1967) (upholding a thirty pound limitation) and upon *Bowe v. Colgate-Palm-*

*olive Co.*, 272 F.Supp. 332 (S.D. Ind. 1967) (upholding a thirty-five pound limitation) both of which were subsequently modified in 408 F.2d 228 (5th Cir. 1969), and 416 F.2d 711 (7th Cir. 1969), respectively, so as to be tantamount to a reversal with regard to the weight-lifting restrictions. Notwithstanding the subsequent modifications of those two cases which the *Gubrandson* court relied upon, *Gubrandson* can be distinguished from the majority federal court position, which is also the modern trend. In *Gubrandson,* the employer's physician determined that the plaintiff was not capable of performing the duties of the "male" job which she tried to obtain, and thus on an individual basis, as opposed to on a generic basis, could not lift the required weight related to the sought-after-job.

It is the conclusion of this Court that the restrictions embodied in the Ohio "protective" laws are unreasonably low, within the meaning of the EEOC Guidelines on Discrimination Because of Sex, which were in effect prior to August 19, 1969. 29 C.F.R. §1604.1(3). (Hereinafter the current EEOC Guidelines on Discrimination Because of Sex will be referred to as Guidelines.) Although some females most assuredly cannot lift weights in excess of twenty-five pounds, likewise some males cannot. *Local 246, Util. Wkrs. U. v. Southern California Edison Co., supra.*

This Court has rejected the contention of General Motors that the weight-lifting restriction is a bona fide occupational qualification, because that contention cannot be supported by Title VII of the Civil Rights Act. This Court started out with the premise that nothing in the Equal Employment Opportunities Act should be deemed to invalidate any state law unless such laws were inconsistent with the provisions of the Act. Furthermore, no person is exempt from liability under any state law not requiring or permitting the doing of an act which would

be an unlawful employment practice under the Equal Opportunity Act. 42 U.S.C. §2000e-7. This section was designed to preserve the effectiveness of state anti-discrimination laws. 110 Cong. Rec. 7243, 12721 (1964); *Local 246, Util. Wkrs. U. v. Southern California Edison Co., supra.* The fatal flaw of the Ohio "protective" laws is the treatment of females as a class and not on an individual basis. The Ohio "protective" laws on a generic basis, as opposed to on an individual basis, exclude women from working more than a forty-eight hour week, lifting weights in excess of twenty-five pounds, and require the furnishing of seats to female employees when not engaged in active duties for which they are employed. The upshot of the "protective" laws is the exclusion of women from certain positions on a generic basis, by stating that they are not physically or biologically suited for such employment. Apparently, this is a carryover of the stereotype that females are the weaker sex. Such employment practices constitute a violation of Title VII of the Civil Rights Act. 42 U.S.C. §2000e-2(a)(1) and (2).

The Ohio "protective" laws apply the "characteristics attributed to the group" to all female employees, 29 C.F.R. §1604.1(a)(1)(ii). An underlying purpose of Title VII is the recognition that women are now to be placed on an equal footing with men. *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).[1] Female employees cannot be placed on an equal footing with male employees if the latter may be appointed to a particular position on a showing that they are physically qualified, when female employees are denied an opportunity to demonstrate their personal physical qualifications. Female employees will be placed on an equal footing, only

1. Hereinafter, reference to *Weeks* and *Bowe v. Colgate-Palmolive Co.*, will be to the respective circuit opinion.

when their fitness for the position is determined on the basis of a showing of individual capacity. *Rosenfeld v. Southern Pacific Co., supra.* See *Bowe v. Colgate-Palmolive Co., supra.* This even-handed policy alone complies with the Congressional purpose of eliminating subjective assumptions and traditional stereotyped conceptions pertaining to the physical ability of women to do particular work. See *Weeks v. Southern Bell Tel. & Tel. Co., supra.*

This Court specifically rejects, as others have done, the argument that the "protective" restrictions in question constitute a bona fide occupational qualification. The acceptance of an argument to the contrary would thwart the Congressional purpose codified in Title VII that individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious or sex groups.

The EEOC, created by the provisions of Title VII of the Civil Rights Act, 42 U.S.C. §2000e-4, via its published Guidelines and policy statements, after a period of considerable hesitation, has adopted the position that state "protective" legislation of the type in question conflicts with the mandate of Title VII. 29 C.F.R. §1604.1 (b) (1) and (2). On August 19, 1969, the EEOC revoked a portion of its old Guidelines, formerly appearing as 29 C.F.R. §1604.1 (a) (3), (b), and (c), and inserted a new subsection (b). The new guideline provides:

> (b) (1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g. the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during

certain hours of the night or more than a specified number of hours per day or per week.

(2) The Commission believes that such laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception. 29 C.F.R. §1604.1(b).

Even under the old guideline, 29 C.F.R. §1604.1(a)(3)(c), the EEOC declared in three cases interpreting it that the guideline should not be read as an approval of general weight limits on the basis of sex in any state, except when imposed on a highly individualized basis. *Bowe v. Colgate-Palmolive Co., supra;* 29 C.F.R. §1604.1(a)(1)(ii).

It is a well settled principle of administrative law that a court must accord deference to an administrative interpretation, formulated by an agency entrusted by Congress with developing expertise in a substantive area of the law, and specifically delegated the responsibility of formulating guidelines in implementing the Congressional mandate. *Griggs v. Duke Power Co., supra; Volkswagenwerk v. FMC,* 390 U.S. 261 (1968); *Udall v. Tallman,* 380 U.S. 116 (1964); *Weeks v. Southern Bell Tel. & Tel. Co., supra; Hicks v. Crown Zellerbach Corp.,* 45 F.R.D. 184 (D. La.

1968). It is the conclusion of this Court that the EEOC is reasonable in its determination that the "protective" restrictions do not constitute bona fide occupational qualifications within the meaning of Title VII. *Bowe v. Colgate-Palmolive Co., supra; Richards v. Griffith Rubber Mills, supra.* In sustaining the EEOC's application of the statutory interpretation, it is not necessary for this Court to hold that the conclusion reached is the only reasonable one, or even that it is the one this Court would have reached if it initially had decided the matter de novo. As set forth in *Weeks, supra*, in order to meet the bona fide occupational qualification test, there must be a factual basis for believing that all or substantially all women would be unable to perform safely the duties of the employment task in question. From a realistic standpoint, there cannot be a reasonable factual basis with regard to the "protective" laws in question. As stated by Mr. Justice Marshall in *Phillips v. Martin Marietta Corp.*, 39 U.S.L.W. 4160 (U.S. January 25, 1971) (concurring):

> The exception for 'bona fide occupational qualifications' was not intended to swallow the rule. That exception has been construed by the EEOC, whose regulations are entitled to 'great deference,' Udall v. Tallman, 380 U.S. 1, 16 (1965), to be applicable only to job situations that require specific physical characteristics necessarily possessed by only one sex.

The Commission has given the only possible construction which is consistent with the Congressional mandate. With regard to the Ohio "protective" laws, females are denied employment opportunities on a basis other than on an appraisal of their individual physical capabilities and endurance in being able to perform the appropriate employment assignments. *See Bowe v. Colgate-Palmolive Co., supra.*

According to the holding of the instant case, the State of Ohio is not precluded from enacting protective laws which contain maximum hour and weight-lifting limitations, and require the furnishing of seats to the employees who are not actively engaged in work. However, those laws must apply to males and females on an even-handed basis. Such legislation would be in full compliance with the intention of Congress in enacting Title VII.

## ISSUE III

The third issue before this Court is whether General Motors should be held liable for the unlawful employment practices engaged therein. This issue turns upon whether General Motors pursued the employment practices heretofore found to be unlawful in good faith reliance upon a written interpretation or opinion of the Commission. If such a defense is established, the issuing of an injunction or awarding of damages will be denied, notwithstanding that the interpretation or opinion relied upon is subsequently modified, rescinded or determined by judicial authority to be invalid or of no legal effect. 42 U.S.C. §2000e-12.

It is the conclusion of this Court that if General Motors does not establish the good faith reliance defense, the issuing of injunctive relief and awarding of damages may be appropriate. 42 U.S.C. 2000e-5(g). The requirement for having "intentionally engaged in or is intentionally engaging in an unlawful employment practice," within the meaning of 42 U.S.C. §2000e-5(g), which triggers the propriety of this Court to issue injunctive relief and award damages, is satisfied when the employer is shown to have "meant to do what he did, that is, his employment practice was not accidental." *Local 189, United Papermak. and*

*Paperwork. v. United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). The court in *Clark v. American Marine Corp.*, 304 F.Supp. 603, 607 (C.D. Cal. 1969), required that the unlawful employment actions be knowingly and voluntarily done. The employment practices in the case at bar, that is the acts themselves, were uncontrovertedly knowingly and voluntarily done, although under the mistaken belief that the acts were not in conflict with Title VII.

General Motors contends that its good faith reliance upon the EEOC guidelines which were in effect prior to August 19, 1969, constituted a complete defense to the granting of injunctive relief, as well as to the awarding of damages. In determining whether General Motors relied upon a written interpretation or opinion of the Commission with regard to employing the unlawful employment practices in question, it is necessary to keep in mind the following:

1. The section of Title VII entitled "Effect on State laws" expressly did not exempt or relieve employers from liability under state "protective" laws, other than those which required the performance of an act which would be an unlawful employment practice. 42 U.S.C. §2000e-7.

2. Title 42 U.S.C. §2000h-4 provides:

> Nothing contained in any title to this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

In the Court's opinion, the two aforementioned sections placed employers on the horns of a dilemma and furnished no meaningful guideline as to what conduct required by the State is unlawful under Title VII.

3. The EEOC Guidelines in effect prior to August 19, 1969, failed to take a definitive position with regard to the effect of the various "protective" statutes in light of Title VII, which clearly outlaws the classification of females on a generic basis. 110 Cong. Rec. 7247; *Griggs v. Duke Power Co.*, 39 U.S.L.W. 4317 (U.S. March 8, 1971). It is the position of this Court that until the Agency, entrusted with implementing the Congressional policy underlying the enactment of Title VII, takes a definitive position with regard to "protective" statutes vis-a-vis Title VII, it would be unreasonable for this Court to hold employers who are without the benefit of agency expertise to make an election at their own peril, as to whether they should comply with the Civil Rights Act and face criminal prosecution by the State of Ohio, or adhere to the law of the State of Ohio and face the possibility of being made a defendant in a civil rights action. See *Pierson v. Ray*, 386 U.S. 547, 557 (1967); See *General Electric Co. v. Hughes*, No. 7922 (S.D. Ohio filed May 3, 1971). As it turned out, General Motors chose to follow a statute which is in conflict with the federal Act. Therefore, it is the conclusion of the Court that General Motors did in fact rely in good faith on the Ohio "protective" laws, and thus injunctive relief and the awarding of damages is impermissible. 42 U.S.C. §2000e-12(b). In *Rosenfeld v. Southern Pacific Co.*, *supra*, the court concluded that the employer did not rely upon a written interpretation or opinion of the Commission but still did not award damages. The *Rosenfeld* Court stated that prior to a judicial determination an employer cannot be faulted for following the explicit provisions of

the applicable state law, when the impact of the federal law upon that of the state is unclear.

Subsequent to the modification of the Guidelines, General Motors continued to employ the same unlawful employment practices, contending that its reliance on the Ohio "protective" laws is still justified. Thus, the remaining sub-issue is whether this Court will fashion injunctive relief and award damages for the continued unlawful employment practices of General Motors subsequent to August 19, 1969, which could no longer be determined to have been justified, because there were no definitive guidelines for the employer to follow. In resolving this sub-issue, this Court is persuaded by the reasoning of the decision of the Southern District of Ohio in *Ridinger v. General Motors, supra.* In *Ridinger,* the court denied issuance of injunctive relief or the awarding of back wages, regardless of whether General Motors relied in good faith upon a written interpretation or opinion of the Commission. The *Ridinger* Court concluded that monetary damages could not be awarded against a person who in good faith complies with a statute subsequently declared unconstitutional. See *Pierson v. Ray, supra.* As of August 19, 1969, the Ohio "protective" laws had not been declared unconstitutional. However, as of that date, the EEOC Guidelines had been modified, but that modification does not require a contrary result. Although the determination of an agency entrusted with the administering of a statute is entitled to considerable weight, the final resolution of a constitutional question, as to whether Title VII supersedes state statutes regulating female employment via the Supremacy Clause, is within the province of the courts. Thus, until the courts are afforded an opportunity to resolve the issue, an employer cannot clearly predict that the Ohio "protective" statutes were invalid. Accordingly, damages cannot be had against such employers.

Moreover, General Motors undertook reasonable steps to remove itself from the horns of the dilemma subsequent to the EEOC's modification of its Guidelines. General Motors wrote a letter to William O. Walker, Director of the Department of Industrial Relations of the State of Ohio, who is one of the officers whose responsibility it is to initiate prosecution for any alleged violation of the Ohio female laws. Ohio Revised Code §§4107.44, 4107.50. The Director, in a reply letter on September 4, 1969, stated that the Department would not initiate such prosecutions, as the Ohio "protective" laws were in conflict with the new federal guidelines published by the EEOC. The aforementioned letter was published by the EEOC on September 24, 1969. On November 17, 1969, in response to General Motors' request of Walker to seek an opinion of the Ohio Attorney General as to the validity of the Ohio "protective" laws, the Director refused the request, stating that even if he elected not to prosecute, any county prosecutor or city solicitor could prosecute if he chose. General Motors contends that in reliance upon Walker's September 4th announcement that the Ohio "protective" laws would not be enforced, on May 1, 1970, General Motors ceased to comply with the Ohio "protective" statutes and no longer made a distinction between female and male employees. However, on September 14, 1970, General Motors was once again placed on the horns of a dilemma, when Walker announced that he would immediately begin to enforce the Ohio "protective" statutes.

As a result of the uncertainty which existed subsequent to August 19, 1969, pertaining to the validity of the Ohio "protective" statutes, this Court finds that General Motors' compliance with those statutes until May 1, 1970 does not afford a basis for awarding damages, as it could not possibly be held accountable for its failure to predict

the future development of constitutional law. *Pierson v. Ray, supra* at 557; *Ridinger v. General Motors, supra.*

Since General Motors has voluntarily ceased to comply with the statutes in question, there is little likelihood, if any, that female employees of General Motors will be deprived of future employment opportunities, resulting from General Motors' compliance with the Ohio "protective" statutes. Therefore, the request for injunctive relief is denied. However, this Court will retain continuing jurisdiction, so as to insure that General Motors does not alter its policy and commence complying with the Ohio "protective" statutes.

In light of the aforementioned holding, this Court need not, and deferring to the well settled constitutional doctrine of not deciding an unnecessary constitutional question, will not, determine whether the Ohio "protective" laws are in violation of the Equal Protection Clause of the Fourteenth Amendment.

This opinion will constitute the Court's findings of fact and conclusions of law.

Plaintiffs are entitled to an award of reasonable attorney's fees against the defendant General Motors. If counsel for the parties are unable to agree upon the amount of such fees, upon their so advising the Court, the matter will be set for hearing in order to present evidence which will enable the Court to fix proper fees.

Counsel for the plaintiffs shall promptly prepare and submit an order expressive of these findings and conclusions in accordance with Rule 4(b) of the Rules of this Court.

/s/ DON J. YOUNG
*United States District Judge*

## APPENDIX C

### Order of the District Court

(Filed October 1, 1971)

No. C69-334

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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VIRGINIA MANNING *et al.*
*Plaintiffs,*

vs.

GENERAL MOTORS CORPORATION *et al.*
*Defendants.*

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ORDER

This cause came on to be heard on motions for summary and declaratory judgment filed by defendants General Motors Corporation, William O. Walker and Gabriel Blumer and by the plaintiffs International Union UAW and Local 913 UAW and upon the motion of plaintiff, Virginia Manning and her class, for declaratory judgment, and the Court having considered all of the documents filed with respect thereto, including the pleadings, affidavits and memoranda, concludes that the motions for summary and declaratory judgment are well taken. The Court has arrived at findings of fact and conclusions of law which are set forth in a written opinion filed herein on August 10, 1971 (Rule 52 F.R.C.P.) and which is incorporated herein by reference. This order is entered in implementation of said findings of fact and conclusions of law.

The Court having found that compliance with the Ohio female protective legislation by the defendant General Motors Corporation constituted discrimination against the plaintiff and the members of her class and that the conciliation agreement signed by the plaintiff and some of the members of her class does not release General Motors Corporation and the Court further having found that General Motors was in good faith in its reliance upon the mandate of such Ohio protective legislation and the initial Guidelines issued by the Equal Employment Opportunity Commission up to May 1, 1970 when General Motors Corporation ceased its compliance with the Ohio female protective legislation, it is

ORDERED that the Ohio female protective statutes, Ohio Revised Code Sections 4107.42, 4107.43 and 4107.46 are contrary to Title VII of the Civil Rights Act of 1964 and are, therefore, void and of no effect by reason of the Supremacy Clause, United States Constitution, Article VI, Section 2, and that the Court need not and will not determine whether the Ohio female protective legislation is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and it is

FURTHER ORDERED that the conciliation agreement executed by Virginia Manning and some members of her class be held to be a release of the local union only and does not release or relieve General Motors Corporation from liability, and it is

FURTHER ORDERED that General Motors was in good faith relying upon the Guidelines of the Equal Employment Opportunity Commission which were in effect prior to August 19, 1969, and it is

FURTHER ORDERED that because of the uncertainty of the validity of the Ohio female protective legislation and

the resultant dilemma in which the defendant General Motors Corporation by reason thereof found itself and because General Motors Corporation in good faith relied upon and complied with said Ohio female protective legislation and the initial Equal Employment Opportunity Commission Guidelines, and subsequent to the change in said Guidelines took reasonable steps to resolve said dilemma, General Motors is not to be held liable for damages for a failure to predict the future development of constitutional law and is therefore not liable to the plaintiffs or any of them for any damages, the prayer for damages being hereby denied, and it is

FURTHER ORDERED that since General Motors Corporation has voluntarily ceased to comply with the Ohio female protective legislation in question, the request for injunctive relief be, and it hereby is, denied, and it is

FURTHER ORDERED that this Court is retaining continuing jurisdiction so as to insure that General Motors Corporation does not alter its policy and commence complying with said Ohio female protective legislation, and it is

FURTHER ORDERED that the plaintiffs are entitled to an award of reasonable attorney fees against the defendant General Motors Corporation to be agreed upon between the parties and, if they are unable to so agree, to advise the Court and that this matter will then be set for a hearing to determine same.

Objections and exceptions of the parties to the Court's findings and conclusions and to this order are noted and saved.

/s/ DON J. YOUNG
*United States District Judge*

## APPENDIX D

### Conflicting Decision of Ninth Circuit Court of Appeals

[¶ 7882] *Mary Lou Schaeffer, Plaintiff-Appellant v. San Diego Yellow Cabs, Inc. et al., Defendants-Appellees.* No. 71-1442.

*Same, Plaintiff-Appellee v. Same, Defendants. Division of Industrial Welfare and Industrial Welfare Commission of State of California, Intervenor Defendant-Appellant.* No. 71-1244.

United States Court of Appeals, Ninth Circuit. June 20, 1972.

On Appeals from United States District Court, Southern District of California. Reversed and Remanded.

Title VII—Civil Rights Act of 1964

Court Action—State Protective Laws—Ruling on Validity—Jurisdiction—Absence of Controversy.—In view of the concession by state authorities as to the invalidity of a state protective law establishing maximum hours of employment for women, there was no longer any controversy warranting review of a trial court's jurisdiction to rule on the validity of the law in a proceeding in which the state was not joined as a party.

Back reference.—¶ 2555.10.

Sex Discrimination—Limits on Hours of Work—State Protective Law—Back Pay—Period of Liability.—Although an employer may be accorded a defense to an assessment of back pay to a female employee deprived of extra earn-

ings under a practice of allowing men to work longer hours than women in his reliance on the requirements of a state protective law limiting the hours females could be employed, a balancing of the female employee's claim for back pay and the public policy behind it against the hardship on the employer requires that the employee be compensated for the extra hours she would have worked except for the discriminatory practice from the date the employer became aware of a trial court's determination and of an EEOC policy change holding that the state protective law was invalid because it conflicted with the sex discrimination provisions of federal law. It would be unfair to require an innocent employee to forego her rights under law by relieving the employer of his back pay liability until there was a final court decision on the state law's validity. 42 U. S. C. Sec. 2000e.

Back references.—¶ 2665; Cal. ¶ 20,799.91.

Sex Discrimination—Limits on Hours of Work—Award of Back Pay—Attorney's Fees.—Since the allowance of reasonable attorney's fees in civil rights cases is an important feature of the enforcement provisions of the Act and since the amount of the award should be proportionate to the extent to which the complainant succeeds in the suit, a determination on appeal that a complaining employee is entitled to a portion of the back pay claimed warrants remand for reconsideration of an award of attorneys' fees that amounted to less than one-third of the fees claimed. 42 U. S. C. Sec. 2000e-5(k).

Back reference.—¶ 2580.10.

Before BARNES, WRIGHT, Circuit Judges, and BYRNE, District Judge.*

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* The Honorable William M. Byrne, Sr., United States District Judge, Central District of California, sitting by designation.

[*Statement of Case*]

BARNES, C. J.: Plaintiff Mary Lou Schaeffer brought this action against her employer, San Diego Yellow Cabs, Inc. (hereinafter the Company), under the Equal Employment Opportunities Act, Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e *et seq.* Plaintiff alleged that the Company had unlawfully discriminated between the sexes by refusing to permit her to work as many hours per day as male employees were permitted to work.

The jurisdiction of the lower court was based upon 28 U. S. C. § 1343 and 42 U. S. C. § 2000e-5(f). Jurisdiction in this court exists under 28 U. S. C. § 1291.

Plaintiff Schaeffer was employed by the defendant Company as a taxicab driver on March 18, 1966. In October of 1966, Schaeffer requested that she be permitted to work 9-hour days. The Company refused as, at that time, it did not permit any of its female drivers to work more than 8-hour days, though male drivers were allowed to work 9-hour days. This limitation on female drivers was in compliance with Section 1350 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission, 8 Cal. Admin. Code § 11460.

In January of 1967, Schaeffer filed charges of discrimination with the Equal Employment Opportunity Commission (hereinafter the Commission or E. E. O. C.). Her charge was rejected as the Commission concluded that the California statutes were valid. In January of 1968, she filed another charge with the Commission on the same grounds. While this second charge was pending, and on November 22, 1968, the case of *Rosenfeld v. Southern Pacific Company*, [1 EPD ¶ 9929] 293 F. Supp. 1219 (C. D. Cal. 1968) was decided. *Rosenfeld* dealt with sex dis-

crimination in employment, and held that various provisions of the California Labor Code, including § 1350, were invalid as conflicting with the Equal Employment Opportunities Act. On January 22, 1969, the Commission reversed its previous ruling and found that there was reasonable cause to believe that the Company was committing unlawful employment practices.

In September of 1969, Schaeffer received notice from the Commission that attempts to secure voluntary compliance had failed, and that she could institute a civil action. On October 7, 1969, the Company announced to its female drivers that they would be allowed to work full 9-hour days like the male drivers.

On the same day, plaintiff Schaeffer filed her complaint. She named as defendants the Company and her union, the Transportation and Allied Workers of California.[1] She sought in her complaint, one, a declaration that Sections 1350 and 1350.5 of the California Labor Code, and Transportation Order No. 9-68 of the California Industrial Welfare Commission were invalid; two, an injunction directing the Company to allow her to work 9-hour days; three, damages for the amount of pay she would have earned if she had been permitted to work 9-hour days since October 15, 1966; and four, attorney's fees and costs.

Following a trial, the court below entered its judgment declaring the California "hours" laws and regulations invalid, and awarding plaintiff $600 attorney's fees. The court denied damages for the lost work time, and refused to issue an injunction in light of the Company's change in policy. Schaeffer filed appeal No. 71-1442, challenging the refusal to award damages and the allowance

1. The union's motion for summary judgment was granted, and it is not a party in either appeal.

of only $600 in attorney's fees. The Commission was permitted to file an *amicus curiae* brief.

The Division of Industrial Welfare and the Industrial Welfare Commission of the State of California (hereinafter California) then sought to intervene as defendants in order to attack the court's rulings on the validity of the statutes and regulations. Eventually, the court granted the motion to intervene, but denied the request for relief. California then filed appeal No. 71-1244.

## I. Appeal No. 71-1244

After judgment was entered by the district court and the appeals were filed, this court on June 1, 1971, handed down its opinion in *Rosenfeld v. Southern Pacific Company*, [3 EPD ¶ 8091] 444 F. 2d 1219 (9th Cir. 1971). In *Rosenfeld*, we held that, under the provisions of 42 U. S. C. § 2000e-7, state legislation could not justify discriminatory treatment of women in employment practices which conflicted with federal law. The State of California decided not to appeal this decision to the United States Supreme Court. Instead, it announced on June 24, 1971, that it would no longer enforce the maximum hours provisions of Sections 1350 and 1350.5.

Consequently, the State of California informed this court that in this case it no longer desired to press its claim that those sections of the Labor Code did not conflict with Title VII of the Civil Rights Act of 1964, and withdrew any claim the state statutes are valid. However, California wishes to continue its attack on the jurisdiction of the district court to declare Sections 1350 and 1350.5 invalid. California argues that no case or controversy existed in the district court on this issue as neither the Company nor the union, the two original defendants, were maintaining the validity of those statutes. It was only after the judg-

ment was entered by the district court, and California intervened, that any arguments in defense of the statutes were presented.

We decline to reach the issue urged by California on appeal. By conceding that the state maximum hours statutes in question conflict with federal law, California has effectively mooted the issue of the district court's jurisdiction to rule on the validity of these statutes.

While plaintiff Schaeffer is named as appellee in appeal No. 71-1244, she no longer is directly interested in the question of the *jurisdiction* of the court below *to determine the validity of the California statutes.* No one challenges the jurisdiction of that court to rule upon Schaeffer's claim for damages. As the invalidity of the California statutes is now admitted, any action by this court, either affirming or reversing the district court's jurisdiction to consider the issue of the validity of the California statutes, cannot affect Schaeffer's appeal on the issue of damages.

California's sole purpose in pursuing this appeal is to obtain a ruling on the scope of a district court's jurisdiction to declare a state statute invalid when the state is not joined as a party. If we made such a ruling, it would be merely an advisory opinion, for no "live" controversy exists between California and Schaeffer.

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *Local No. 8-6, Oil, Chemical and Atomic Workers, etc. v. Missouri,* [39 LC ¶ 66,135] 361 U. S. 363, 367, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960)." *Rosenfeld v. Southern Pacific Company,* 444 F. 2d at 1221.

Therefore, we dismiss appeal No. 71-1244 on the grounds that it does not present a case or controversy between the parties to this action.

## II. Appeal No. 71-1442

### *A. Back Pay*

Plaintiff Schaeffer contends that under § 706(g) of Title VII of the Civil Rights Act of 1964,[2] she is entitled to back pay for the hour per day she was prevented from working by her employer. The *amicus* brief filed by the Commission deals almost exclusively with material supporting Schaeffer's damages claim.

Liability under § 706(g) only attaches to an employer who intentionally engages in an unlawful employment practice. We agree with the Fifth, Seventh, and Tenth Circuits, and adopt a broad interpretation of the term "intentionally" to include all employment practices engaged in deliberately rather than accidentally. *Local 189, United Papermakers and Paperworkers v. United States,* [2 EPD ¶ 10,047] 416 F. 2d 980, 996 (5th Cir. 1969), *cert. denied,* [2 EPD ¶ 10,177] 397 U. S. 919 (1970); *Sprogis v. United Air Lines, Inc.,* [3 EPD ¶ 8239] 444 F. 2d 1194, 1201 (7th Cir. 1971), *cert. denied,* [4 EPD ¶ 7588] 404 U. S. 991 (1971); *Jones v. Lee Way Motor Freight, Inc.,* [2 EPD ¶ 10,283] 431 F. 2d 245, 250 (10th Cir. 1970), *cert. denied,* [3 EPD ¶ 8139] 401 U. S. 954 (1971); see *Griggs v. Duke Power Co.,* [3 EPD ¶ 8137] 401 U. S. 424 (1971). The prac-

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2. "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)." 42 U. S. C. § 2000e-5(g).

tice of the Company in allowing men to work longer than women comes within this interpretation of § 706(g). The fact that the Company may have been relying on a state statute does not make their actions any less of a violation under § 706(g). *LeBlanc v. Southern Bell*, [4 EPD ¶ 7674] 333 F. Supp. 602 (E. D. La. 1971).

However, the conclusion that the company violated § 706(g) does not automatically entitle Schaeffer to the damages she demands. A court may enjoin and may award damages, but should only order affirmative action, such as back pay, when such relief is "appropriate". In the case of damages of this nature, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of the Equal Employment Opportunities Act and the fundamental concepts of fairness.

The Company argues that reliance on a state statute which the employer believes in good faith to be enforceable should serve as a complete defense to damages for back pay. *LeBlanc v. Southern Bell, supra; Kober v. Westinghouse Electric Corp.*, [3 EPD ¶ 8176] 325 F. Supp. 467 (W. D. Penn. 1971); *Ridinger v. General Motors Corporation*, [3 EPD ¶ 8175] 325 F. Supp. 1089 (S. D. Ohio 1971).

Plaintiff and the Commission respond that the purpose of the Equal Employment Opportunities Act is better served by showing preference to the innocent employee over the innocent employer. They argue that to permit the defense claimed by the Company would discourage employees from attacking unlawful practices involving state statutes by removing an important financial incentive. The Commission cites a number of cases under the Fair Labor Standards Act and the National Labor Relations Act which hold that lack of intent to violate federal labor statutes and good faith reliance on orders of administrative agencies

are not defenses to claims for back pay. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, [61 LC ¶ 10,518] 396 U. S. 258 (1969); *Hodgson v. American Can Co.*, [3 EPD ¶ 8171] 440 F. 2d 91 (8th Cir. 1971); *Schultz v. Mistletoe Express Service, Inc.*, [64 LC ¶ 32,424] 434 F. 2d 1267 (10th Cir. 1970); *American Machinery Corp. v. NLRB*, [62 LC ¶ 10,808] 424 F. 2d 1321 (5th Cir. 1970); *Laidlaw Corp. v. NLRB*, [60 LC ¶ 10,272] 414 F. 2d 99 (7th Cir. 1969); *Wirtz v. Malthor, Inc.*, [57 LC ¶ 32,022] 391 F. 2d 1 (9th Cir. 1968).

Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a goodfaith employer.

When Schaeffer first requested permission to work 9-hour days in October of 1966, the Company would have been required to violate a state statute in order to grant her request. Under the generally prevailing conception of the scope of Title VII, it was reasonable for the Company to assume that the state statutes involved were valid, and could be successfully enforced. The Commission's rejection of Schaeffer's charges in 1967 supported the Company's actions.[3] When Schaeffer filed her second charge in January of 1968, the basic situation was the same.

However, on November 22, 1968, the district court issued its opinion in *Rosenfeld v. Southern Pacific Company*, [1 EPD ¶ 9929] 293 F. Supp. 1219 (C. D. Cal. 1968). The Company admits that it knew of this case shortly after it was decided. In January of 1969, the Commission reversed

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3. Under the regulations promulgated by the Equal Employment Opportunities Commission and in effect in 1965-1969, the state statutes involved here would have been considered valid. 29 C. F. R. § 1604.1(b) and (c), 30 Fed. Reg. 14927 (Dec. 2, 1965). Although the Commission reversed its thinking in this matter about 1968, it was not until mid-1969 that the regulations were amended. 29 C. F. R. § 1604.1(b), 34 Fed. Reg. 13368 (Aug. 11th, 1969).

its position and concluded that there was probable cause to believe that the Company was engaged in an unlawful employment practice.

We believe that by the time the Company had notice of both the *Rosenfeld* decision in the district court and the Commission's reversal in policy, reliance upon the state statute in continuing to deny Schaeffer the right to work 9-hour days could no longer be considered to be in good faith and serve as a defense against the damages.[4] We conclude, therefore, that Schaeffer is entitled to receive back pay for the extra hour per day from the date when the Company had knowledge of both the *Rosenfeld* case *and* the Commission's decision in favor of Schaeffer (i.e., on some undertermined date subsequent to 1/22/69, to and including 10/7/69, the date the company allowed 9-hour daily employment for women).

We reject the argument that an employer should not be held for claims of back pay until a "final" court decision, such as our decision in *Rosenfeld* in June of 1971. It is unfair to force an innocent employee to forego his rights under law while litigation drags through the courts (which, in the *Rosenfeld* case, took nearly three years).

We do not understand that our earlier statements in *Rosenfeld's* penultimate paragraph (concerning prospective application of that decision) to bar the result we reach in this case. 444 F. 2d at 1227. We are not applying the *Rosenfeld* decision retroactively. The Company was in violation of federal law for a certain time prior to the date this suit was filed. *Rosenfeld* did not intend to

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4. We reject the idea advanced by the Commission that the Company should be held responsible for failing to file a declaratory judgment action against the state to obtain a ruling on the validity of the statutes. A company in such a case cannot always, and perhaps never can, be expected to press a claim on behalf of its employees with sufficient fervor to insure as adequate presentation of the merits of the claim before the court.

automatically forgive all violations of Federal law that occurred prior to that decision. Plaintiff in this case had filed her suit in the district court well before the decision in *Rosenfeld* by this court. We stated in *Rosenfeld* that our decision would not necessarily affect actions pending prior to our decision. 444 F. 2d at 1227.

As stated we feel that a proper balance between the Company and Schaeffer would be had by holding the Company liable for damages from the time it had notice of the district court's decision in *Rosenfeld* and the Commission's reversal in position, up to and including 10/7/69. We therefore remand this case to the district court so that it may reopen the matter, take testimony, and calculate the amount of damages.

B. Attorney's Fees

Section 706(k) of Title VII grants a district court discretion to allow the prevailing party reasonable attorney's fees. The court below awarded Schaeffer $600 in attorney's fees, though an itemized claim for $2,220 was submitted. The court stated no reasons for allowing less than one-third of the claimed fees, but it was not required to do so.

The allowance of reasonable fees in civil rights cases is an important feature of the enforcement provisions of that Act. See *Newman v. Piggie Park Enterprises, Inc.*, [2 EPD ¶ 9834] 390 U. S. 400 (1968). The amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices. However, the amount of the award should also be proportionate to the extent to which the plaintiff prevails in the suit. We believe that the district court should reconsider the award of attorney's fees in light of our decision that plaintiff is entitled to a small portion of the back pay claimed

by her. We do not intend to express any opinion whether the amount of fees to be awarded should or should not be enlarged over the amount heretofore allowed. We recognize a large discretion on such matters rests with the trial court, guided by the usual principles of how such matters are determined.[5]

Appeal No. 71-1442 is *reversed* and remanded for further proceedings suggested herein.

Appeal No. 71-1244 is *dismissed*.

[Dissenting Opinion]

BYRNE, D. J. (dissenting):

I respectfully dissent from that part of the opinion in Appeal No. 71-1442 relating to the allowance of damages.

This controversy should be added to the ranks of those cases which recognize that employers acting pursuant to obligatory state laws cannot be deemed to have intentionally violated Section 706(g) of Title VII. *LeBlanc v. Southern Bell*, [4 EPD ¶ 7674] 333 F. Supp. 602 (E. D. La. 1971); *Kober v. Westinghouse Electric Corp.*, [3 EPD ¶ 8176] 325 F. Supp. 467 (W. D. Penn. 1971); *Ridinger v. General Motors Corporation*, [3 EPD ¶ 8175] 325 F. Supp. 1089 (S. D. Ohio 1971); *Richards v. Griffith Rubber Mills*, [2 EPD ¶ 10,001] 300 F. Supp. 338 (D. Ore. 1969).

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5. Although no attorneys' fees were requested by appellant Schaeffer on this appeal, the Commission draws our attention (by letter subsequent to argument) to the case of *Malone v. North American Rockwell Corporation*, [4 EPD ¶ 7736] ..... F. 2d ....., (No. 26009, decided by this court on March 23, 1972). The statute (42 U. S. C. § 2000e-5(k)) is available only to the appellant Schaeffer and is couched in permissive language. Under the particular circumstances of this case, we award no attorneys' fees, as costs, on this appeal. Appellant is entitled to her ordinary costs, as the prevailing party.

The fact that Yellow Cab continued to rely on state law after the District Court ruling in *Rosenfeld* does not alter its position. This court, in affirming Judge Ferguson's ruling, acknowledged that such lower court decisions do not, *ipso facto*, relieve employers of their fealty to state law:

> "Moreover, in view of the California statutes referred to above, the conclusion that the company engaged in 'discrimination' in refusing to assign plaintiff to the Thermal position carries with it no invidious connotation. Prior to a judicial determination such as evidenced by *this* opinion, an employer *can hardly be faulted for following the explicit provisions of applicable state law.*" (emphasis added)

*Rosenfeld v. Southern Pacific Co.*, 444 F. 2d at 1227.

Here, the district court found the acts of sex discrimination committed by the Yellow Cab Company were the product of good faith reliance upon the laws of California and not intentional commission of unlawful employment practices. Accordingly, the court found that damages for loss of wages for the period of time when the restriction operated was "not authorized."

The majority adopts the argument of the plaintiff that if there are two innocent parties to a controversy, preference should be shown to the innocent employee over the innocent employer.

If both are innocent, why should either be penalized?

I would affirm.

COPY

JAN 23
MICHAEL RODAK, JR.

No. 72-850

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

VIRGINIA MANNING, *et al.*, *Petitioners,*

vs.

GENERAL MOTORS CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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### Reports Of Opinions

The opinion of the Sixth Circuit Court of Appeals is reported *sub. nom. Manning* v. *International Union, etc.* at 466 F.2d 812. It has also been reported at 5 EPD, Paragraph 7964 (CCH) and at 4 FEP Cases 1282.

The decision of the District Court, the United States District Court for the Northern District of Ohio, Western Division, has not been reported in the Federal Supplement, but was reported at 3 EPD, Paragraph 8325 and at 3 FEP Cases 968.

The decision of the Court of Appeals is annexed to the Petition herein as Appendix A. The decision of the District Court is annexed to the Petition herein as Appendix

B, and the order of the District Court is annexed to the Petition as Appendix C.

## Jurisdiction Of The Court

The jurisdictional requisites for filing a petition for certiorari are adequately set forth in the Petition. Respondent denies that the Petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a writ of certiorari.

However, to the extent that compliance with Supreme Court Rule 21, paragraph 4 is jurisdictional, the Proof of Service of the Petition filed by Petitioner fails to disclose service of copies of the Petition upon representatives of the State of Ohio who were parties in both the District Court and the Court of Appeals.

## Question Presented For Review

The Petition raises the question whether or not the Court of Appeals erred in holding that the District Court did not abuse its discretion under Section 706(g) of the Civil Rights Act of 1964, quoted infra page 3, by refusing to award back pay under circumstances where (1) the employer acted in good faith reliance upon the 1965 Guidelines of the Equal Employment Opportunity Commission (herein after EEOC) in following the Ohio "female protective statutes," (2) took reasonable steps to resolve the dilemma in which the employer found itself when the EEOC reversed itself and changed its Guidelines effective August 19, 1969, to state that such state "female protective statutes" were in conflict with Title VII of the Civil Rights Act of 1964, and (3) thereafter the employer voluntarily ceased compliance with said Ohio statutes effective May 1, 1970.

This is essentially the same question presented in *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 462 F.2d 1228 (C.A.S., 1972), *cert. denied*, Nov. 6, 1972, No. 72-295 in which certiorari was denied November 6. 1972.

## Statutes Involved

Page 3 of the Petition sets forth Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) as a statute involved herein. For ease in reference, that section reads as follows:

> "(g) If the Court finds that the respondent has intionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . ."

The specific finding of the District Court which was affirmed by the Sixth Circuit Court of Appeals was that General Motors relied in good faith upon the Guidelines of the EEOC in continuing to comply with the Ohio "female protective statutes." This fact makes the provisions of Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b) applicable to the question presented here. That Section provides:

> "(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good

faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by a judicial authority not to be in conformity with the requirements of this title."

*Ohio Revised Code*, Sections 4107.42, 4107.43, 4107.46, and 4107.99, the pertinent provisions of the Ohio female protective laws, appear in the Appendix to this brief. (Appendix, pages 29-34) Also included in the Appendix are the 1965 and 1969 Guidelines of the EEOC. (Appendix, pages 17-29)

## Statement Of The Case

Petitioners are female employes at the Sandusky, Ohio plant of General Motors Corporation. A charge dated December 30, 1966, was filed by the named petitioner, Virginia Manning, under Title VII of the Civil Rights Act of 1964 with the EEOC claiming that General Motors Corporation discriminated against her because of her sex. Petitioner commenced the instant suit after receiving a notice of right-to-sue from EEOC.

In December 1965, the EEOC published its initial Guidelines on Discrimination Because of Sex. 30 Fed. Reg. 14926-14928. (Appendix, pages 17-27) These Guidelines were declared to be interpretations of the EEOC pursuant to Section 713(b), 42 U.S.C. § 2000e—12(b), quoted supra, page 4. Section 1604.1(c) of these Guidelines provided, in essence, that state limitations on employment of females would provide a basis for application of the bona fide occupational qualification exemption provided in the Civil Rights Act and that an employer would not be considered to be engaged in an unlawful employment practice when he refused to employ females in jobs in which they were legally prohibited from being employed.

In reliance upon these Guidelines, General Motors continued its long established practice of complying with the female protective laws of Ohio. The Ohio female protective statutes, which had been upheld by this Court in *Hawley* v. *Walker*, 232 U.S. 718 (1914), restricted the hours per day, the number of days per week, the number of hours per week, types of occupations and the amount of weight lifting which could be required by female employes, and provided criminal punishment of fine or imprisonment or both for their violation. (Appendix, pages 29-34)

Without any change in its Guidelines, in May 1969, the EEOC forwarded to General Motors its decision dated March 28, 1969, on the charges of Petitioner and others, holding that obedience by General Motors to state law constituted a violation of Title VII. In an earlier decision by the EEOC involving an employe at another Ohio plant of General Motors Corporation, the EEOC had refused to find that adherence to Ohio law violated Title VII.

On August 19, 1969, more than four years after the effective date of Title VII, the EEOC issued new Guide-

lines in which it concluded for the first time that state female protective legislation violated Title VII. 34 Fed. Reg. 13367-13368. (Appendix, pages 27-29)

On October 22, 1969, before this action was filed, General Motors Corporation and the UAW jointly wrote to the Director of the Department of Industrial Relations of the State of Ohio, the official charged with enforcement of the Ohio protective legislation, requesting that an opinion be obtained from the Ohio Attorney General concerning the continuing validity of the Ohio female protective statutes in light of the amended EEOC Guidelines. In November, 1969, after this suit was filed, the Director replied stating that he would not request an opinion from the Attorney General since his department had ceased enforcing the statutes following the EEOC Guideline change. However, he also warned that local law enforcement officials might still seek to enforce those statutes. The State of Ohio resumed enforcement of those statutes in September, 1970.

General Motors continued to give careful attention to this matter. On December 31, 1969, the Attorney General for the State of Michigan ruled that the Michigan female protective laws were invalid. In view of this ruling which affected large numbers of General Motors employes at its Michigan operations, and in light of developing case authority, General Motors, on May 1, 1970, voluntarily ceased compliance with the Ohio female protective laws.

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), its Local 913, and the appropriate enforcement officials of the State of Ohio were also parties in the lower courts.

The District Court issued its opinion on August 19, 1971, holding that the state statutes were pre-empted by Title

VII, but that no back pay should be awarded to the claimants inasmuch as obedience by General Motors to Ohio law was in good faith reliance upon the interpretations of the EEOC in its Guidelines and that General Motors Corporation took reasonable steps to resolve its dilemma when the EEOC changed its Guidelines.

The Sixth Circuit Court of Appeals affirmed the District Court, holding that the District Court did not abuse its discretion in refusing to award back pay inasmuch as there had been no prior judicial interpretations of the validity of the Ohio laws. *Jones Metal Products Co.* v. *Walker*, 29 Ohio St.2d 173, 281 N.E.2d 1 (1972), declaring the Ohio statutes in conflict with Title VII, was not decided until some six months after the decision of the District Court in this case. The Ohio Court of Appeals had earlier held in the *Jones Metal* case at 25 Ohio App.2d 141, 267 N.E.2d 814 (1971), that the Ohio statutes did not conflict with Title VII. Furthermore the EEOC had not taken a definitive stand with respect to the relationship between Title VII and such state protective legislation until two months before this suit was filed and nearly three years after the events complained of had occurred.

## Reasons For Denying The Writ

### 1. Certiorari Should Not Be Granted Because This Is Not An Appropriate Issue For Supreme Court Decision.

Petitioner is, in effect, requesting this Court to review the record to determine whether under the particular facts of this case the District Court abused its discretion by refusing to award back pay. The Sixth Circuit has done so and found no abuse of discretion. Rather than establishing a proposition generally applicable to all Title VII cases

that damages should not be awarded as contended by Petitioner, the decision of the Sixth Circuit was limited to the holding that "[u]nder all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs." (Appendix to Petition, p. 18). Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) requires that if the District Court finds an intentional violation, only then "the court *may* enjoin . . . and order such affirmative action as *may* be appropriate, which *may* include reinstatement or hiring of employees, with or without back pay . . . ." (Emphasis added) Thus, the Congressional intent as expressed by the language used clearly was to grant the District Court wide discretion to fashion appropriate relief. If this Court were to review every case presenting only a question of abuse of discretion by a trial court, it would quickly be overwhelmed by the deluge of cases which would result.

**2. Certiorari Should Not Be Granted Because All Parties To The Proceedings In The Lower Courts Have Not Been Made Respondents.**

It appears from the Petition that only General Motors is made a respondent. The Proof of Service filed by petitioner fails to disclose any service upon the officials of the State of Ohio who were parties in the lower courts as required by paragraph 4 of Rule 21 of this Court. Petitioner has not filed nor served upon the other parties a written notice that "one or more of the parties below have no interest in the outcome of the petition" as required by Rule 21.

The Ohio officials appealed from the District Court's holding that the Ohio protective statutes were superseded by Title VII, but following the decision of the Ohio Supreme Court in *Jones Metal Products* v. *Walker*, 29 Ohio St.2d

173, 281 N.E.2d 1 (1972), they moved the Sixth Circuit for leave to withdraw their appeal and to be dismissed as parties. The Sixth Circuit permitted only the withdrawal of their appeal, and therefore the Ohio officials are still parties who are required to be served under Rule 21 in the absence of the notice provided for in the Rule.

Without all parties before it, this Court should deny the Petition.

**3. There Is No Conflict Between The Decision Of The Court Of Appeals In The Instant Case And The Decision Of The Ninth Circuit In *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (1972).**

As her primary reason in support of her Petition, petitioner has alleged a conflict between the decision in the instant case and the decision of the Ninth Circuit in the *Schaeffer* case (a copy of which is Appendix D to the Petition). In doing so, she has used almost the identical language of the petitioner in *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 462 F.2d 1228 (C.A.S., 1972), *cert. denied*, Nov. 6, 1972, No. 72-295 in which certiorari was denied on November 6, 1972. The decision of the Fifth Circuit in *LeBlanc* is reported at 460 F.2d 1228 (1972).

The instant case is much closer to the *LeBlanc* case than to the *Schaeffer* case. Perhaps the most significant distinction between the instant case and *LeBlanc* on the one hand, and *Schaeffer* on the other, is found in the rulings of the respective courts on good faith reliance upon state statutes. In *Schaeffer* the court found that after another case had declared the statute relied upon invalid, continued obedience to that statute was not in good faith (462 F.2d at 1007; Appendix to Petition, p. 55). On the other hand,

the court in *LeBlanc* specifically found good faith on the part of the employer on the facts present in that case. In the instant case the court not only found good faith reliance by General Motors on the Ohio statutes, but also found that General Motors relied in good faith upon the 1965 Guidelines of EEOC. In the instant case the District Court, whose decision was specifically affirmed by the Sixth Circuit, made the following specific findings:

> ". . . the Court further having found that General Motors was in good faith in its reliance upon the mandate of such Ohio protective legislation and the initial Guidelines issued by the Equal Employment Opportunity Commission up to May 1, 1970, when General Motors Corporation ceased its compliance with the Ohio female protective legislation. . . ." (Petition, p. 44).

The Court further held:

> "FURTHER ORDERED that General Motors was in good faith relying upon the Guidelines of the Equal Employment Opportunity Commission which were in effect prior to August 19, 1969. . . ." (Petition, p. 44).

The order of the trial court also contained the following:

> ". . . General Motors Corporation in good faith relied upon the complied with said Ohio female protective legislation and the initial Equal Employment Opportunity Commission Guidelines. . . ." (Petition, p. 45).

While not specifically relied on by the lower courts, the findings made by the District Court and affirmed by the Sixth Circuit make applicable to the instant case the provisions of Section 713(b) of the Civil Rights Act, quoted

supra page 4. That Section, in light of the findings made by the lower courts, serves to relieve General Motors of any liability in the instant case because of its reliance upon EEOC Guidelines. Thus, the instant case provides even stronger support for the denial of back pay than did *LeBlanc* in which certiorari was denied inasmuch as there were no findings in *LeBlanc* relative to reliance on the EEOC Guidelines.

*Schaeffer* is further distinguishable from the instant case in that there had been a prior judicial determination of the invalidity of the very statute relied upon by the employer. In the instant case, as in *LeBlanc*, however, there had been no such prior determination of the invalidity of the Ohio protective statutes. Indeed, while the instant case was pending, the Ohio Court of Appeals held in *Jones Metal Products* v. *Walker*, 25 Ohio App.2d 141, 267 N.E.2d 814 (1971) that there was no conflict between the Ohio statutes and Title VII. While *Jones Metal* was reversed by the Ohio Supreme Court at 29 Ohio St.2d 173, 281 N.E.2d 1 (1972), such reversal did not come until six months after the decision of the District Court herein.

Furthermore, there is no conflict between *Schaeffer* and the instant case in view of the fact that the Ninth Circuit specifically refused to lay down a rule applicable to all cases and limited its decision to the particular facts of the case before it, stating:

> "Rather than drawing any hard and fast rule concerning the defense of good faith reliance on a state statute, we believe that in each case the merits of the plaintiff's claim and the public policy behind it must be balanced against the hardship on a good-faith employer." (462 F.2d at 1007; Petition, p. 54).

In the instant case, the Sixth Circuit limited its holding to those facts particularly applicable to General Motors when it stated:

> "Under all the circumstances of this case we cannot conclude that the District Judge abused his discretion in denying back pay to these plaintiffs."
> (466 F.2d 816; Petition, p. 18).

Thus, each court limited itself to the specific case before it rather than attempting to phrase a general rule of law applicable to all cases. Under such circumstances, there can be no conflict between the decisions.

At page 9 of her Petition, Petitioner suggests a possible conflict with *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (C.A. 7, 1969). As the Sixth Circuit pointed out in its decision herein, the *Bowe* case "involved no statute and related to a company-imposed weight limitation for female employees." (466 F.2d 815; Petition, p. 17). Thus, there was no federal-state dilemma present in *Bowe* as there is in the instant case.

**4. Certiorari Should Be Denied Because There Is No Question Of Continuing General Interest To Be Resolved.**

Originally the EEOC Guidelines supported the validity of state female protective legislation. (See comment in *Schaeffer* at 462 F.2d 1007, footnote 3; Petition, p. 54). These Guidelines provided that they were written interpretations of the EEOC as provided for in Section 713(b), 42 U.S.C. § 2000e-12(b) quoted supra page 4. It was not until it amended its Guidelines effective August 19, 1969, that the EEOC issued its written interpretation that state female protective statutes conflicted with Title VII. The vacillation and hesitancy of the EEOC on the state statute

question are detailed in an article by Richard K. Berg, former Deputy General Counsel and Acting General Counsel for the EEOC, entitled "Title VII: A Three Years View" in 44 Notre Dame Lawyer 311 (1969).

However, once the EEOC took a firm stand against state female protective laws in 1969, numerous decisions of state and federal courts and also Attorney General rulings have not hesitated to strike down such protective laws. As a result, the issue which petitioner attempts to raise is of a transitory nature, and it is highly improbable that a similar case could arise in the future. Therefore, any decision in this case would be highly unlikely to affect future court decisions or future action by either employers or employes inasmuch as most, if not all, cases in which this question could have any bearing have already been concluded.

Petitioner claims that General Motors should have affirmatively sought a ruling from the EEOC under Section 713(b), 42 U.S.C. Section 2000e-12(b). In making such an assertion petitioner ignores the fact that the EEOC Guidelines themselves upon which General Motors was found to have relied stated that they were such an interpretation under that section. Moreover, the discrimination charge filed by petitioner with the EEOC was pending before the EEOC for more than two years prior to the decision of the EEOC. Under these circumstances, General Motors or any other employer had no reason to believe that a request for an interpretation would have been acted upon by the EEOC any more speedily or promptly than the discrimination charge filed by petitioner or would be different than the published Guidelines.

This Court has frequently said that the interpretations of the agency charged with administration of a particular

statute are entitled to great deference. *E.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971). However, when the agency charged with the administration and enforcement of an Act cannot make up its own mind on an issue, it is unreasonable to expect private litigants subject to that Act to resolve the dilemma which the hesitation and vacillation of that agency has created. This is particularly true where, as here, the Guidelines in effect prior to August, 1969, stated affirmatively that compliance with state statutes would not be a violation of Title VII.

It was the indecision of the EEOC coupled with continued enforcement of state protective laws by state officials which gave birth to this instant case and others like it. Now that the EEOC has taken a firm position, state enforcement of protective laws has ceased. Three years have passed since the EEOC stated its position, and there can neither be general interest in nor continuing application of any proposition advanced by petitioner.

**5. Certiorari Should Be Denied Because The Decision Of The Sixth Circuit Was Correct.**

The language of the Civil Rights Act of 1964, as set forth above, makes it discretionary with the District Court to fashion the relief to be granted, if any, and it has universally been so held by those courts considering the question.

Both the District Court and the Court of Appeals carefully reviewed the record in this case and concluded that it would be manifestly unjust to assess back pay against an employer such as General Motors caught between conflicting governmental edicts. In the light of the lack of

clear guidance from the EEOC and the enforcement of state laws by state officials, any employer acted in peril of liability on one side or the other no matter what action the employer took.

Under such circumstances the Sixth Circuit correctly held that the District Court did not abuse its discretion in refusing to award back pay to petitioner.

## CONCLUSION

Since the revision of the EEOC Guidelines in 1969 and subsequent judicial decisions, there should be and is no further uncertainty with respect to the relationship between Title VII and state protective legislation. Thus, there is no great or continuing public interest requiring that this Court concern itself with a question which is not likely to reoccur in the future.

The specific provisions of Section 713(b), 42 U.S.C. § 2000e-12(b), flatly prohibit the relief sought by petitioner under the circumstances of the instant case and particularly in view of the specific findings of the District Court as affirmed by the Sixth Circuit.

There is no conflict between the decision in the instant case and the decision of the Ninth Circuit in the *Schaeffer* case for the following reasons: (1) the vast difference in the facts of the cases including the different status of judicial interpretations of the statutes of the two states involved; (2) the differences in findings with respect to good faith reliance on state statutes; (3) the finding of good faith reliance on EEOC Guidelines present in the instant case and absent in the *Schaeffer* case; and (4) the limitation by both Courts of their respective decisions to

the specific facts before them for consideration. On the other hand, the instant case is quite similar to the *LeBlanc* case in which this Court denied certiorari.

The Petition for writ of certiorari to the Sixth Circuit should be denied.

Respectfully submitted,

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DATED: January 22, 1973

## APPENDIX

30 Federal Register 14926-15928

December 2, 1965

Chapter XIV—Equal Employment

*Part 1604—Guidelines on Discrimination Because of Sex*

By virtue of the authority vested in it by Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), the Equal Employment Opportunity Commission hereby amends Chapter XIV of Title 29 of the Code of Federal Regulations to add a new Part 1604, entitled Guidelines on Discrimination Because of Sex. Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, they shall become effective immediately and shall be applicable with respect to cases presently before or hereafter filed with the Commission.

The new Part 1604 reads as follows:

*Introduction.* The following guidelines are interpretations of the Commission published pursuant to Section 713(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-12(b), and §1601.30 of the Commission's regulations, 29 CFR 1601.30.

The Commission has proceeded with caution in interpreting the scope and application of Title VII's prohibition of discrimination in employment on account of sex. We are mindful that there is little relevant legislative history to serve as a guide to the intent of Congress in this area. Also, there is little light in the experience with state statutes. An overly literal interpretation of the prohibition

might disrupt longstanding employment practices required by state legislation or collective bargaining agreements without achieving compensating benefits in progress towards equal opportunity.

These guidelines are an effort to temper the bare language of the statute with common sense and a sympathetic understanding of the position and needs of women workers. Nevertheless, where the plain command of the statute is that there be no artificial classification of jobs by sex, the Commission feels bound to follow it, notwithstanding the fact that such segregation has, in particular cases, worked to the benefit of the woman worker.

Probably the most difficult area considered in these guidelines is the relation of Title VII to state legislation designed originally to protect women workers. The Commission cannot assume that Congress intended to strike down such legislation. Yet our study demonstrates that some of this legislation is irrelevant to present day needs of women, and much of this legislation is capable, in particular applications, of denying effective equality of opportunity to women.

Title VII, which makes suspect any sex distinction in employment, and state protective legislation, which requires special treatment for women, represent competing value judgments which cannot easily be harmonized. Clarification and improvements can however be achieved. We believe it desirable—even essential—that Congress and the state legislatures address themselves to this problem. State legislatures will find archaic provisions in their laws which should be updated. And the Congress may wish to determine how much weight should be given to outmoded laws whose practical effect today is not so much to protect as to disadvantage.

## *Appendix*

The many State commissions on the Status of Women, which have expressed concern that some protective laws may have lost their rationale, may wish to make appropriate recommendations to State legislatures. The Women's Bureau of the Department of Labor, which has been studying these laws, should soon have available a definitive analysis with special emphasis on the relevance of these laws to current technology and women's increasingly important role in society.

Sec.

1604.1 Sex as a bona fide occupational qualification.

1604.2 Separate lines of progression and seniority systems.

1604.3 Discrimination against married women.

1604.4 Job opportunities advertising.

1604.5 Employment agencies.

1604.6 Pre-employment inquiries as to sex.

1604.7 Relationship of Title VII to the Equal Pay Act.

*Authority:* The provisions of this Part 1604 are issued pursuant to Sec. 713(b), Civil Rights Act of 1964, 78 Stat. 265.

§1604.1 Sex as a bona fide occupational qualification.

(a) The Commission believes that the bona fide occupational qualification exception as to sex should be inter-

preted narrowly. Labels — "Men's jobs" and "Women's jobs"—tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotype characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in subparagraph (2) of this paragraph.

(iv) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification exception unless the expense would be clearly unreasonable.

(2) Where it is necessary for the purpose of authenticity of genuineness, the Commission will consider sex to

be a bona fide occupational qualification, e.g. an actor or actress.

(3) Most States have enacted laws or administrative regulations with respect to the employment of women. These laws fall into two general categories:

(i) Laws that require that certain benefits be provided for female employees, such as minimum wages, premium pay for overtime, rest periods or physical facilities;

(ii) Laws that prohibit the employment of women in certain hazardous occupations, in jobs requiring the lifting of heavy weights, during certain hours of the night, or for more than a specified number of hours per day or per week.

(b) The Commission believes that some state laws and regulations with respect to the employment of women, although originally for valid protective reasons, have ceased to be relevant to our technology or to the expanding role of the woman worker in our economy. We shall continue to study the problems posed by these laws and regulations in particular factual contexts, and to cooperate with other appropriate agencies in achieving a regulatory system more responsive to the demands of equal opportunity in employment.

(c) The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception. However, in cases

where the clear effect of a law in current circumstances is not to protect women but to subject them to discrimination, the law will not be considered a justification for discrimination. So, for example, restrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women.

(1) An employer, accordingly, will not be considered to be engaged in an unlawful employment practice when he refuses to employ a woman in a job in which women are legally prohibited from being employed or which involve duties which women may not legally be permitted to perform because of hazards reasonably to be apprehended from such employment.

(2) On the other hand, an employer will be deemed to have engaged in an unlawful employment practice if he refuses to employ or promote a woman in order to avoid providing a benefit for her required by law—such as minimum wage or premium overtime pay.

(3) Where state laws or regulations provide for administrative exceptions, the Commission will expect an employer asserting a bona fide occupational qualification pursuant to this paragraph to have attempted in good faith, to obtain an exception from the agency administering the state law or regulation.

§1604.2 Separate lines of progression and seniority systems.

(a) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex

is bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male," or for a job in a "male" line or progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a "female" seniority list; and vice versa.

(b) A seniority system or line of progression which distinguishes between "light" and "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

§1604.3. Discrimination against married women.

(a) The Commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

(b) It may be that under certain circumstances, such a rule could be justified within the meaning of Section 703(e)(1) of Title VII. We express no opinion on this question at this time except to point out that sex as a bona

fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle such as the desirability of spreading work.

§1604.4 Job opportunities advertising.

(a) Help wanted advertising may not indicate a preference based on sex unless a bona fide occupational qualification makes it lawful to specify male or female.

(b) When a newspaper or other publication classifies such advertising in separate "Male," "Female," and "Male and Female" columns, advertising will most clearly avoid an indication of preference by using the "Male and Female" column. However, advertisers covered by the Civil Rights Act of 1964 may place advertisements for jobs open to both sexes in columns classified "Jobs of Interest —Male" or "Jobs of Interest—Female" provided (1) the advertisement specifically states that the job is open to males and females and (2) substantially the following notice appears in a prominent place on every other page in the section in which the classified advertising appears:

*Notice*: Many listings in the "male" or "female" columns are not intended to exclude or discourage applications from persons of the other sex. Such listings may be used because some occupations are considered more attractive to persons of one sex than the other. Discrimination in employment because of sex is prohibited by the 1964 Federal Civil Rights Act with certain exception (and by the law of ..... State). Employment agencies and employers covered by the Act must indicate in their advertisement whether or not the listed positions are available to both sexes.

*Appendix*

Abbreviations, such as M & F, may be used in the advertisement to indicate that males and females may apply, if such abbreviations are readily comprehensible or are explained in the notice.

§1604.5 Employment agencies.

(a) Section 703(b) of the Civil Rights Act specifically states that it shall be unlawful for an employment agency to discriminate against any individual because of sex. The Commission has determined that private employment agencies which deal exclusively with one sex are engaged in an unlawful employment practice, except to the extent that such agencies limit their services to furnishing employees for particular jobs for which sex is a bona fide occupational qualification.

(b) An employment agency that receives a job order containing an unlawful sex specification will share responsibility with the employer placing the job order if the agency fills the order knowing that the sex specification is not based upon a bona fide occupational qualification. However, an employment agency will not be deemed to be in violation of the law, regardless of the determination as to the employer, if the agency does not have reason to believe that the employer's claim of bona fide occupations qualification is without substance and the agency makes and maintains a written record available to the Commission of each such job order. Such record shall include the name of the employer, the description of the job and the basis for the employer's claim of bona fide occupational qualification.

(c) It is the responsibility of employment agencies to keep informed of opinions and decisions of the Commission on sex discrimination.

*Appendix*

1604.6 Pre-employment inquiries as to sex.

A pre-employment inquiry may ask "Male————, Female————"; or "Mr., Mrs., Miss," provided that the inquiry is made in good faith for a non-discriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

§1604.7 Relationship of Title VII to the Equal Pay Act.

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.-119-800.163. Relevant opinions of the Administrator interpret-

ing "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

Signed at Washington, D.C., this 24th day of November 1965.

Franklin D. Roosevelt, Jr.,

*Chairman.*

[F.R. Doc. 65-12874; Filed, Dec. 1, 1965; 8:47 a.m.]

* * *

34 Federal Register 13367-13368

August 19, 1969

*Title 29—Labor*

Chapter XIV—Equal Employment Opportunity Commission

*Part 1604—Guidelines on Discrimination Because of Sex*

Sex as a Bona Fide Occupational Qualification

By virtue of the authority vested in it by section 713(b) of the Act, 42 U.S.C. §2000e-12(b), the Commission hereby amends Title 29, Chapter XIV, §1604.1(a)(3), (b), and (c) of the Code of Federal Regulations by revoking said paragraphs and substituting in lieu thereof a new §1604.1(b).

Because the provisions of the Administrative Procedure Act (5 U.S.C. 1003) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, the amendment shall become effective immediately

and shall be applicable with respect to charges presently before or hereafter filed with the Commission.

§1604.1 Sex as a bona fide occupational qualification.

(a) • • •

(3) [Revoked]

(b)(1) Many States have enacted laws or promulgated administrative regulations with respect to the employment of females. Among these laws are those which prohibit or limit the employment of females, e.g., the employment of females in certain occupations, in jobs requiring the lifting or carrying of weights exceeding certain prescribed limits, during certain hours of the night, or for more than a specified number of hours per day or per week.

(2) The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

(c) [Revoked]

(Sec. 713, 78 Stat. 265, 42 U.S.C. 2000e-12)

This amendment is effective upon publication.

Signed at Washington, D.C., this the 15th day of August 1969.

[SEAL] William H. Brown, III,
*Chairman.*

[F.R. Doc. 69-9840; Filed, Aug. 18, 1969; 8:50 a.m.]

* * *

[FEMALE EMPLOYEES]

**§ 4107.42 Working conditions for females.** (GC § 1008)

Every person, partnership, or corporation employing females in any factory, workshop, business office, telephone or telegraph office, restaurant, bakery, millinery or dressmaking establishment, or mercantile or other establishments shall provide a suitable seat for the use of each female so employed and shall permit the use of such seats when such female employees are not necessarily engaged in the active duties for which they are employed and when the use thereof will not actually and necessarily interfere with the proper discharge of the duties of such employees. Such seat shall be constructed, where practicable, with an automatic back support and so adjusted as to be a fixture but not obstruct employees in the performance of duty. Such person, partnership, or corporation shall provide a suitable lunchroom, separate and apart from the workroom, and in establishments where lunchrooms are provided, female employees shall be entitled to not less than thirty minutes for meal time. In any such establishment in which

it is found impracticable to provide a suitable lunchroom, female employees shall be entitled to not less than one hour for meal time during which hour they shall be permitted to leave the establishment. No restriction as to hours of labor shall apply to canneries or establishments engaged in preparing for use perishable goods during the season they are engaged in canning their products.

No person, partnership, or corporation, or agent thereof, shall violate this section.

**§ 4107.43 Occupations in which employment of females prohibited.**

The employment of females in the following occupations or capacities is prohibited:

Crossing watchman, section hand, express driver, metal moulder, bell hop, taxi driver except between the hours of six a. m. and nine p. m., gas or electric meter reader, as workers in blast furnaces, smelters, mines, or quarries except in the offices thereof, in shoe shining parlors, bowling alleys as pin setters, poolrooms, barrooms and saloons or public drinking places which cater to male customers exclusively, in delivery service on motor propelled vehicles of over one ton capacity, in operating freight or baggage elevators if such elevators and the doors thereof are not automatically or semi-automatically controlled, in baggage handling, freight handling, trucking, and handling by means of hand trucks heavy materials of any kind, or in employments requiring frequent or repeated lifting of weights over twenty-five pounds.

**§ 4107.45 Definitions.** (GC § 1008-3)

As used in sections 4107.42, 4107.45 to 4107.53, inclusive, and 4109.22 of the Revised Code:

(A) "Employ" includes permit or suffer to work.

(B) "Employer" includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other person having control or custody of any employment, place of employment, or of any employee.

(C) "Day" includes a calendar day from midnight to midnight; provided, that anything in this section or section 4107.46 of the Revised Code to the contrary, at least ten hours must elapse between the end of one day's work and the beginning of the next day's work; provided that except as otherwise provided in section 4107.46 of the Revised Code, the work during any one day does not exceed eight hours and the work during any one calendar week does not exceed forty-eight hours.

**§ 4107.99 Penalties.**

(A) Whoever violates section 4107.09 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars for each day after the expiration of the time designated in the notice mentioned in such section until the alterations or additions have been made. The faliure to comply with such notice constitutes a single offense, with the amount of the fine dependent upon the number of days the failure continues; in a subsequent prosecution as provided in such section, the fine shall be computed upon the number of days intervening between the date of the former conviction and the filing of the subsequent affidavit.

(B) Whoever violates division (D) of section 4107.13 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars for a first offense; for each sub-

sequent offense such person shall be fined not less than two [hundred] nor more than five hundred dollars.

(C) Whoever violates section 4107.14 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

(D) Whoever violates section 4107.19 of the Revised Code shall be fined not more than twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not more than one hundred dollars.

(E) Whoever violates section 4107.20 or 4107.21 of the Revised Code shall be fined not less than fifty nor more than one hundred dollars or imprisoned not less than thirty nor more than sixty days, or both.

(F) Whoever violates section 4107.24 of the Revised Code shall be fined not less than one hundred nor more than three hundred dollars.

(G) Whoever violates section 4107.25 of the Revised Code shall be fined not less than one hundred nor more than two hundred dollars for a first offense; for each subsequent offense such person shall be fined not less than five hundred nor more than one thousand dollars.

(H) Whoever violates section 4107.26 or 4107.27 of the Revised Code shall be fined not less than one hundred nor more than one thousand dollars.

(I) Whoever violates section 4107.30 of the Revised Code shall be fined not less than fifty dollars for a first offense; for each subsequent offense such person shall be fined not less than one hundred nor more than one thousand dollars.

(J) Whoever violates section 4107.37 of the Revised Code shall be fined not less than five hundred nor more than

one thousand dollars or imprisoned not less than thirty days nor more than one year, or both.

(K) Whoever violates section 4107.38 of the Revised Code shall be fined not less than ten nor more than one hundred dollars.

(L) Whoever violates section 4107.39 of the Revised Code shall be fined not less than twenty-five nor more than one hundred dollars for a first offense; for a second offense such person shall be fined not less than two hundred nor more than three hundred dollars; for each subsequent offense such person shall be imprisoned not less than thirty nor more than ninety days.

(M) Whoever violates section 4107.40, 4107.41, 4107.42, or 4107.43 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars.

(N) (1) Whoever violates section 4107.46 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not more than sixty days, or both. Whenever any person has been notified by the chief of the division of workshops and factories or his authorized representative, or by the service of a summons in a prosecution, that he is violating such section, such person shall be fined not less than twenty-five nor more than two hundred dollars or be imprisoned not more than sixty days, or both, for each day that such violation has continued after such notification. The employment of any female in violation of such section constitutes a separate offense with respect to each female so employed.

(2) Whoever violates section 4107.48, 4107.49, or 4107.52 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not

more than sixty days, or both. Whenever any person has been notified by the chief of the division of workshops and factories or his authorized representative that he is violating such sections, and has been given a reasonable time in which to remedy the conditions which constitute such violation, he shall be fined not less than twenty-five nor more than two hundred dollars or imprisoned not more than sixty days, or both, for each day that such violation has continued after the expiration of the time allowed by the chief or his authorized representative for remedying such conditions.

No person shall be imprisoned for more than one year at one time for violation of sections 4107.45 to 4107.53, inclusive, of the Revised Code.

(O) Whoever violates section 4107.61 of the Revised Code shall be fined not less than twenty nor more than fifty dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than two hundred dollars or imprisoned not more than ten days.

## Certificate Of Service

We hereby certify that three copies of the within brief for the Respondent, General Motors Corporation were this day served by mail on the following:

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January 19, 1973

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*Attorneys for Respondent*